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A TREATISE

ON THE LAW OF

CARRIERS OF PASSENGERS

IN TWO VOLUMES

VOL. I.

BY

NORMAN FETTER

Author of a Handbook on "Equity Jurisprudence"

ST. PAUL, MINN.

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PREFACE.

The law pertaining to carriers of passengers has grown with the growth of the carrying business; and the great bulk of the litigated cases, in the United States at least, has been decided since the close of the Civil War. With but few principles of the old common law to guide them, and with but little assistance from the legislative department, the courts have been compelled to grapple with new and interesting questions not foreclosed by the history of the past. "By free reasoning upon the actual facts of life," and guided by broad and comprehensive considerations of justice and public policy, the courts have practically created a new common law, instinct with all the vitality of youth.

An effort has been made in the following pages to set forth, in an orderly manner, the living law on this subject as it exists to-day, and to give a concise account of its development, and of the reasons which have moved the judges to its adoption. To accomplish this object, the Reports have been ransacked volume by volume, and an attempt, at least, has been made to fuse and weld the great mass of material thus obtained into a clear and coherent narrative. The conflict of opinion and the errors inevitably occurring in blazing the way through unexplored regions of jurisprudence have been noted; but no attempt has been made to magnify apparent conflict of judicial opinion into a real conflict.

In taking leave of a task which has occupied several years, it is impossible to refrain from paying a tribute of respect

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to the rugged sense of justice which has pervaded the great body of the judges in announcing the law on this subject. It is but the statement of a truism to say that the law which they have created in grappling with concrete questions day by day, and year by year, judge-made though it be, is more serviceable and more essentially just than any Code promulgated by the legislative department on the advent of railways could possibly have been.

In conclusion, the writer hereof acknowledges an indebtedness to Mr. N. M. Thygeson, of the St. Paul bar, for many practical suggestions made during the progress of the work.

N. F.

St. Paul, Minn., Sept. 22, 1897.

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A TREATISE

ON THE LAW OF

CARRIERS OF PASSENGERS.

VOL. 1.

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§ 1. LIABILITY DEPENDS ON NEGLIGENCE OR WILLFUL WRONG.

A common carrier is not an insurer of passengers; and a passenger who has been injured on his journey is bound to show that the injury resulted either from the willful wrong or from the negligence of the carrier or his servants.[1]

§ 2. SAME—HISTORY OF RULE.

In the ancient common law the leading idea seems to have been that a man ought to pay for all the harm he does his neighbors, without regard to any question of blameworthiness.[1] "He that is damaged ought to be recompensed," was the maxim.[2] This principle seems

§ 1. [1] Nicholls v. Railroad Co., Ir. R. 7 C. L. 40.

§ 2. [1] 2 Pol. & M. Hist. Eng. Law, 474.

[2] Brown v. Collins, 53 N. H. 442. In this case the court says: "The drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country. Formerly, in England, there seems to have been no well-defined test of an actual tort. Defendants were often held liable, 'because,' as Ray-

to have applied with its full force to bailees of property. Mr. Justice Holmes [3] has shown that from the earliest cases in the Year Books down to the great case

mond says, 'he that is damaged ought to be recompensed'; and not because, upon some clearly-stated principle of law, founded upon actual culpability, public policy, or actual justice, he was entitled to compensation from defendant." Even in very recent times cases have been decided on the principle that a man is liable for injuries to his neighbor without fault on his part. The leading modern case is Fletcher v. Rylands, L. R. 1 Exch. 265, affirmed in L. R. 3 H. L. 330. In this case it was held that one who on his own land constructs a reservoir, and collects water therein, must keep it in at his peril; and if it escapes, and injures his neighbor's property, he must answer in damages, though he exercised proper care in the construction and maintenance of the reservoir. "He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of the vis major or the act of God:" but otherwise he is liable. This case has been followed in some of the American courts, but for the most part the principle of the decision has been rejected as unsound. "No one is responsible for injuries resulting from unavoidable accident while engaged in a lawful business," says the supreme court of the United States in Parrott v. Wells, Fargo & Co., 15 Wall. 524. Some years earlier, Chief Justice Shaw said: "We think, as the result of all the authorities, that the rule is that the plaintiff must come prepared with evidence to show that the intention was unlawful, or that defendant was in fault; for, if the injury was unavoidable, and the conduct of the defendant free from blame, he will not be held liable. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom." Brown v. Kendall, 6 Cush. (Mass.) 292. The court of appeals of New York has announced the same doctrine: "One who does an act lawful in itself, from which damage results to another, is not answerable for such damage, unless he has been guilty of negligence or other fault in the manner of doing the act." Losee v. Buchanan, 51 N. Y. 476. In view of the fact that the liability of common carriers of passengers is now concededly based on negligence, it is unnecessary to pursue the subject further.

[3] Holmes, Com. Law, c. 5, "Bailments."

of Southcot v. Bennet,[4] decided in Lord Coke's time, reaffirming the old doctrine, "it was clear law that, if a person accepted the possession of goods to keep for another, even as a favor, and lost them by wrongful taking, wholly without his fault, he was bound to make good the loss, unless when he took possession he stipulated against such liability." [5] This continued to be the law until 1703, when the old common law was overthrown by Lord Holt in the famous case of Coggs v. Bernard.[6] In that case the chief justice distinguished between bailees for reward exercising a public employment and other bailees, denied the application of the old common law to the latter class, but on grounds of public policy held it applicable with something more than its pristine rigor to the former class.[7] "The law charges the person, thus intrusted, to carry goods as against all events but the act of God and the enemies of the king," is Lord Holt's dictum in this case. This dictum was formally adopted as the common law by solemn decision in Lord Mansfield's time; [8] and now the fundamental principle of the common law on this subject is that a common carrier of goods is answerable for their safety as insurer, except as against the acts of God and the public enemies, without regard to any question of negligence.[9]

For a time at least it seemed doubtful whether or

[4] Cro. Eliz. 815; 4 Coke, 83b.

[5] Holmes, Com. Law, p. 179. See, also, 2 Bl. Comm. 452.

[6] 2 Ld. Raym. 909; 1 Smith, Lead. Cas. 369.

[7] Holmes, Com. Law, c. 5.

[8] Forward v. Pittard, 1 Term R. 27.

[9] 2 Kent, Comm. 597.

not the same principle would be applied by the courts to common carriers of persons. The earliest reported case where a common carrier was sued for personal injuries to a passenger is that of White v. Boulton,[10] decided in 1791. In that case it was contended on behalf of defendant, who was proprietor of a mail coach, that the passenger traveled at his own risk, because the coach proprietor was primarily engaged in a branch of the public service, to wit, carrying the mails. But Lord Kenyon curtly said that the idea was "too absurd to enter the head of any man." "When these coaches carry passengers, the proprietors of them are bound to carry them safely and properly."

A number of other early decisions proceeded on the assumption that common carriers of passengers are insurers of their safe transportation, at least so far as roadworthiness of vehicles is concerned.[11] And in Alden v. New York Cent. R. Co.[12] it was expressly held that a common carrier of passengers is bound, absolutely and irrespective of negligence, to provide roadworthy vehicles. The great weight of authority, however, has always been that the liability of carriers of passengers depends on negligence. In 1809, Chief Justice Mansfield charged the jury:[13] "There is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier is answerable at all events. But he does not warrant

[10] Peake, 113.

[11] Sharp v. Grey, 9 Bing. 457; Bremner v. Williams, 1 Car. & P. 414, 416; Israel v. Clark, 4 Esp. 259.

[12] 26 N. Y. 102.

[13] Christie v. Griggs, 2 Camp. 79.

the safety of passengers." In Aston v. Heaven,[14] Chief Justice Eyre ruled that an action against a carrier for injuries to a passenger is founded on negligence; and the carrier is not, like a carrier of goods, liable in all cases except where the accident happens from the act of God or of the king's enemies. But it was not until 1869 that the question was finally settled in England. In the case of Readhead v. Railway Co.[15] the court said: "We are of opinion, after consideration of the authorities, that there is no contract either of general or limited warranty and insurance entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care (including in that term the use of skill and foresight) to carry a passenger safely. It of course follows that the absence of such care—in other words, negligence—would alone be a breach of this contract." [16]

[14] 2 Esp. 532. See, also, Crofts v. Waterhouse, 3 Bing. 319; Harris v. Costar, 1 Car. & P. 636.

[15] L. R. 4 Q. B. 379.

[16] In Bridges v. Directors, etc., of North London Railway Co., L. R. 7 H. L. 231, Brett, J., said: "It is an implied part of the contract of carriage that defendants and their servants will use reasonable care and skill in the conveyance of passenger to his agreed destination. And if defendants or their servants have been negligent or wanting in reasonable skill in the conveyance, and the passenger has been injured, there has been a breach of contract, for which defendants are liable, and for which the passenger is entitled to compensation by way of damages." In Butler v. Manchester, S. & L. Ry. Co., 21 Q. B. Div. 207, it is said: "The contract between the passenger and the carrier really is that, on his paying the fare for the journey, it will carry him in its carriage on the journey for which he has paid the fare, using due care for his safety while so doing."

In the United States the courts have been equally emphatic in declaring that carriers are not insurers of the safety of their passengers. As long ago as 1845 the supreme court of Massachusetts, in an able opinion,[17] declared the rule to be that carriers are bound to exercise due care for the safety of their passengers; but that, if an injury happens to a passenger which cannot be guarded against by the exercise of a sound judgment and vigilant oversight, the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of pecuniary recompense. "The analogies of carriers of freight have nothing to do with passenger carriers. These are liable only when there has been actual negligence of themselves or their servants." [18] "A common carrier of passengers is not an insurer of the passenger's safety against all the accidents and vicissitudes of travel, but is an insurer against all risks caused or increased by the negligence of the carrier, where the passenger is not at fault. The negligence of a common carrier in carrying the passenger includes his negligence in all the departments of his undertaking: the condition of the road, the character of the machinery, the quality of the cars, the sufficiency of the equipments, the skill and conduct of the agents and employés,—in everything, indeed, necessary to the safety of the passenger when he is not himself at fault." [19]

[17] Ingalls v. Bills, 9 Metc. (Mass.) 1.

[18] Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

[19] Grand Rapids & I. R. Co. v. Boyd, 65 Ind. 526.

This rule is now in force throughout the United States, except in Nebraska, where it has been modified by statute.[20] It has been adopted as law by the supreme court of Louisiana, where the civil law prevails.[21] In Williams v. Pullman Palace-Car Co.[22] that court said: "In dealing with matter of litigation growing out of the construction of railway law, in connection with railway accidents, the supreme court of Louisiana will endeavor to place its rulings in line and in harmony with the adjudications of the supreme court of the United States, and of courts of last resort of the American Union, in all cases in which they do not conflict with the special and exceptional system of laws prevailing in Louisiana." [23]

[20] For the Nebraska statute, see post, § 27. An exception seems also to be created by the Code of California, for which see post, § 25.

[21] In Black v. Carrollton R. Co., 10 La. Ann. 33, it is said: "It is an implied condition of the contract of railroad companies with each passenger that he shall not be put in jeopardy of life or limb by any fault, even the slightest, of the servants of the company."

[22] 40 La. Ann. 417, 4 South. 85.

[23] The American cases on this subject are so numerous that a bare citation must suffice: George v. Railroad Co., 34 Ark. 613; Fairchild v. Stage Co., 13 Cal. 599; Sanderson v. Frazier, 8 Colo. 80, 5 Pac. 632, and cases cited; Hall v. Steamboat Co., 13 Conn. 319; Flinn v. Railroad Co., 1 Houst. (Del.) 469; Chicago, B. & Q. R. Co. v. George, 19 Ill. 510; Illinois Cent. R. Co. v. O'Connell, 59 Ill. App. 463, and cases cited. "Carriers of passengers are not answerable for injuries to passengers at all events; they are only liable for want of due care." Stockton v. Frey, 4 Gill (Md.) 406. See, also, Baltimore & Y. T. R. Co. v. Leonhardt, 66 Md. 70, 5 Atl. 346; Huelsenkamp v. Railway Co., 37 Mo. 537, and cases cited; New York, L. E. & W. R. Co. v. Ball, 53 N. J. Law, 283, 21 Atl. 1052; Palmer v. Canal Co., 120 N. Y. 170, 24 N. E. 302, affirming 46 Hun, 486; Simmons v. Steamboat Co., 97 Mass. 361; Gilbert v. Railway Co., 160 Mass. 403, 36 N. E. 60; Feital v. Railroad

§ 3. NEGLIGENCE DEFINED.

Actionable negligence is the unintentional breach of a duty to take care in the exercise of one's rights and duties, proximately producing damage to a person entitled to claim observance of that duty.[1]

Co., 109 Mass. 398; New Jersey Traction Co. v. Gardner (N. J. Err. & App.) 31 Atl. 893; Laing v. Colder, 8 Pa. St. 479; Meier v. Railroad Co., 64 Pa. St. 225; McClenaghan v. Brock, 5 Rich. Law (S. C.) 17, 26; Railroad v. Mitchell, 11 Heisk. (Tenn.) 400; Texas & P. Ry. Co. v. Buckelew, 3 Tex. Civ. App. 272, 22 S. W. 994; Stokes v. Saltonstall, 13 Pet. 181; Dunlap v. The Reliance, 2 Fed. 249.

§ 3. [1] 12 Quart. Law Rev. p. 187, April, 1896. The above definition of "negligence" seems to be fairly accurate, including all the essential elements of negligence, and excluding all nonessentials. Numerous other definitions of negligence have been formulated. One of the most widely quoted is that of Baron Alderson in Blyth v. Waterworks, 11 Exch. 784: "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." This definition has been criticised as being "no more a definition of negligence than of the opium habit, or the excessive use of intoxicating liquors, or gambling, or reckless speculation, or forty other things." Beach, Contrib. Neg. § 2. Another definition by eminent English authority is that of Brett, M. R., in Heaven v. Pender, 11 Q. B. Div. 503: "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property." One of the best definitions of "negligence" formulated by the judges is that in Caniff v. Navigation Co., 66 Mich. 638, 33 N. W. 744: "Actionable negligence consists in the omission of the duty to observe due care, according to the circumstances, to prevent injury to the person or property of one who has the right to expect that the duty will be performed." The supreme court of Louisiana has formulated the following definition in Summers v. Railroad Co., 34 La. Ann. 139: "Ju-

§ 4. ESSENTIAL ELEMENTS OF NEGLIGENCE.

As will be seen from the foregoing definition, the essential elements of negligence are: (1) The existence of a duty to exercise care; (2) the inadvertent breach of that duty; (3) injury, as a proximate consequence, to one to whom that duty is due.[1]

ridical negligence is the inadvertent omission to do something which it would be the legal duty of a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, to do, or the inadvertently doing something which it would be the legal duty of a prudent and reasonable man not to do, such act or omission being on the part of a responsible human being, and being such as in ordinary natural sequence immediately results in the injury complained of." The court then proceeds to point out the merits of the definition as follows: "This definition, though, perhaps, redundant, includes unequivocally all essentials, and excludes acts not properly within the domain of negligence. It excludes offenses or intentional wrongs. It excludes mere moral duties. It excludes irresponsible persons, of whom various classes are mentioned by Mr. Wharton; and it excludes all acts or omissions which, though they may be negligent with reference to certain relations or contingencies, have no causal connection with the injury complained of." The civil law definition is stated to be as follows in Pollock on Torts (Am. Ed.) p. 14: "Negligence is the failure to exercise that care and circumspection which is due one man from another." Other definitions are given in the following recent cases: L. Wolff Manuf'g Co. v. Wilson, 152 Ill. 9, 38 N. E. 694; Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512; Brown v. Congress & B. St. Ry. Co., 49 Mich. 153, 13 N. W. 494; Flint & P. M. Ry. Co. v. Stark, 38 Mich. 714; Bridges v. Directors, etc., of North London Ry. Co., L. R. 7 H. L. 232.

§ 4. [1] In Shear. & R. Neg. § 5, negligence is analyzed as follows: "Negligence consists in (1) a legal duty to exercise care; (2) a breach of that duty; (3) the absence of distinct intention to produce the precise damage, if any, which actually follows. With this negligence, in order to sustain a civil action, there must concur: (1) Damage to the plaintiff; (2) a natural and continuous sequence, uninterruptedly

§ 5. SAME—DUTY TO EXERCISE CARE.

An essential element of negligence is a duty to exercise care. If there is no such duty, there can be no negligence.[1]

The duty of a carrier to use care for the safety of his passenger is imposed by the common law.[2] It is true that the failure of a carrier to exercise proper care, resulting in injury to a passenger, may be, and sometimes

connecting the breach of duty with the damage, as cause and effect." In Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, it is said: "In every case involving actionable negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by defendant to perform that duty; and (3) an injury to the plaintiff from such failure of defendant. When these elements are brought together, they unitedly constitute negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient."

§ 5. [1] Carpenter v. Cohoes, 81 N. Y. 21; Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460; Sweeny v. Railroad Co., 10 Allen (Mass.) 372. It is not sufficient to show that a defendant owed a duty which it failed to discharge to some one or class of persons other than plaintiff. But it must appear that there existed a duty to the plaintiff which the defendant failed to discharge. Mexican Nat. Ry. Co. v. Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126.

[2] The duty of a carrier to use due and proper care and skill in conveying a passenger does not necessarily arise out of contract between the passenger and the carrier, but is imposed by law. Collett v. Railway Co. (1851) 16 Q. B. 984. "It is now settled that a railroad carrier, by its acceptance of a passenger as a passenger, comes under an obligation to take due and reasonable care for his safe carriage, which obligation arises by implication of law, and independent of contract, in that it may exist although the contract of carriage is illegal, or there is no express contract of carriage." New York, L. E. & W. R. Co. v. Ball, 53 N. J. Law, 283, 21 Atl. 1052; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. Law, 169, 19 Atl. 178.

is, regarded as a breach of the carrier's contract. But in truth this duty has been imposed on carriers by the common law, as enunciated by the courts, quite regardless of any contracts which they may make with their passengers.[3] At any rate, in determining what constitutes negligence on the part of the carrier, the result is the same whether we view the duty to exercise care as arising out of contract or as a tort independent of contract,[4] though there may be a material difference when we get to the question of pleading and damages.[5]

§ 6. SAME—INADVERTENT BREACH OF DUTY.

In the next place, the decided weight of modern authorities is that, to constitute negligence, the breach of duty to exercise care must be inadvertent, and not intentional or willful.[1] An intentional or willful injury, wrongfully inflicted on another, either in his per-

[3] For example, courts have very generally denied carriers the right to relieve themselves by contract from the consequences of their negligence, on the ground that the liability for negligence is imposed by the common law, and does not arise out of contract. See post, c. 28.

[4] Pol. Torts (Am. Ed.) p. 534.

[5] See post, §§ 119, 422-425.

§ 6. [1] 2 Jag. Torts, p. 821. In Parker v. Pennsylvania Co., 134 Ind. 679, 34 N. E. 504, it is said: "'Willfulness' and 'negligence' are incompatible terms. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such degree as to become willfulness." "A willful injury is that which flows from an injurious act purposely committed, with the intent to commit the injury. In determining whether an act is done willfully, the circumstances of the case, the manner in which the act was done, and the effect thereof must be considered, in connection with the presumption

son or property, renders the wrongdoer liable to the injured person, without regard to the question whether any duty to exercise care existed. But, when the duty to exercise care exists, an inadvertent breach of it is negligence, and constitutes the foundation for an action in damages.

§ 7. SAME—PROXIMATE CAUSE OF INJURY.

In the third place, it must appear that the breach of duty alleged and proved is the proximate cause of the injuries for which plaintiff sues. The entire subject of proximate cause, so far as it relates to the subject of carriers and passengers, is treated in a subsequent chapter.[1]

§ 8. DEGREE OF CARE REQUIRED OF PASSENGER CARRIERS.

For the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business.[1]

that every person intends the natural and probable consequences of his wrongful acts; and an unlawful intent may be inferred from conduct which shows a reckless disregard of consequences, and a willingness to do injury by purposely and voluntarily doing the act, with knowledge that some one is in a situation to be unavoidably injured thereby." Citizens' St. Ry. Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627, citing Palmer v. Railroad Co., 112 Ind. 256, 14 N. E. 70.

§ 7. [1] Post, c. 9.

§ 8. [1] This is the rule expressly enunciated in some of the cases, and

EXCEPTION: In some states, the carrier is required to exercise only ordinary care as to the construction and maintenance of stational facilities.[2]

is believed to be the clear result of all the cases on the subject. "Common carriers of passengers are required to do all that human care, foresight, and vigilance can reasonably do, consistently with the mode and character of conveyance adopted, and the practicable prosecution of the business, to prevent accidents to passengers riding upon their trains or alighting therefrom." Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 38 N. E. 578; citing Chicago, B. & Q. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812; Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22; Keokuk N. L. P. Co. v. True, 88 Ill. 608; Galena & C. U. R. Co. v. Fay, 16 Ill. 558; Chicago, B. & Q. R. Co. v. George, 19 Ill. 510. "While the law demands the utmost care for the safety of passengers, it does not require railroad companies to exercise all the care, skill, and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible risk. They are not required, for the purpose of making their roads perfectly safe, to incur such expense as would make their business wholly unprofitable, and drive prudent men from it. They are, however, independently of their pecuniary ability so to do, required to provide all things necessary to the security of the passenger reasonably consistent with their business and appropriate to the means of conveyance employed by them; and to adopt the highest degree of practicable care, skill, and diligence that is consistent with the operation of their roads, and that will not render their use impracticable or inefficient for the intended purposes of the same." Arkansas Midland Ry. v. Canman, 52 Ark. 517, 13 S. W. 280, citing many cases. "When it is said that they are held to the highest degree of care and skill for the safety of their passengers, it is not meant that they are required to use every possible precaution, for that, in many instances, would defeat the very objects of their employment. There are certain dangers that are necessarily incident to that mode of travel, and these the passenger assumes when he elects to adopt it. But all that is meant is that they should use the highest degree of care that is reasonably consistent with the practical conduct of the business." Pershing v. Railroad Co., 71 Iowa, 561, 566, 32 N. W. 488, and cases cited.

[2] For the degree of care as to safety of stations, etc., see post, § 47.

§ 9. SAME—REASON OF THE RULE.

The attempt to ingraft on the common law the three degrees of negligence described by the terms "slight," "ordinary," and "gross," conceived by the schoolmen of the middle ages to correspond to the division of the subject in the Roman law, has generally been successfully resisted by our courts as impracticable.[1] As a general proposition, the tendency of the courts now is to hold that the degree of care required in a given case depends on circumstances, and must be commensurate with the situation.[2] Carriers of passengers, who undertake for a reward to swiftly transport human beings from place to place by the powerful but dangerous instrumentalities of steam and electricity, and who have intrusted to their safe-keeping the most valuable of all things,—human lives,—must exercise the highest degree of care, which simply means that they must take all these things into account, and exercise a degree of care commensurate with the situation.[3]

§ 9. [1] "The theory that there are three degrees of negligence, described by the terms 'slight,' 'ordinary,' and 'gross,' has been introduced into the common law from some of the commentators of the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable to distinguish between them. Their signification necessarily varies according to the circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation." Per Curtis, J., in The New World, 16 How. 469, 474.

[2] 2 Jag. Torts, pp. 816, 818, and cases there cited.

[3] Mitchell, J., in Hall v. Railroad Co., 46 Minn. 440, 49 N. W. 239. "That rule does not rest upon any technical or artificial division of neg-

Even before the application of steam as a motive power, when all passenger traffic on land was carried on by means of stage coaches, the courts united in holding that carriers must exercise the "utmost care and skill," [4] and provide for the safety of their passengers "as far as human care and foresight will go." [5] The reason for this rule probably lies in the fact that the courts were unwilling to extend to common carriers of passengers the rule of the common law holding carriers of property liable as insurers; and by way of compromise this high degree of care was exacted of passenger carriers. And when, in comparatively recent times, the application of steam as a motive power revolutionized the face of the earth, and caused the entire carrying traffic to fall into the hands of wealthy and powerful corporations, the courts, on grounds of public policy, continued to exact from them the highest practicable degree of care.[6] In the subjoined note

ligence into grades or classes, but springs naturally from an application to such facts of the general principle that a man of ordinary prudence is required to exercise a care proportionate to the risks he assumes to the business in hand. Where he undertakes a risk involving safety of life and limb to those with whom he deals, he is charged with a care proportionate to the peril. When a passenger commits his person to a carrier for hire for transportation over rivers, through cities, in the night,—it may be while asleep,—at a speed expressive of the progress of the age in which we live, he may justly demand the exercise of such care on the part of the carrier against disaster as in the nature of things such undertaking would imply." Furnish v. Missouri Pac. Ry. Co., 102 Mo. 438, 13 S. W. 1044.

[4] Lord Ellenborough in Jackson v. Tollett (1817) 2 Starkie, 37.

[5] Christie v. Griggs, 2 Camp. 79.

[6] In Farwell v. Railroad Co., 4 Metc. (Mass.) 49, Chief Justice Shaw says that "the rule is founded on the expediency of throwing the risk upon those who can best guard against it." In McDonough v. Lan-

is given the language of the courts as to the degree of care required of passenger carriers.[7]

pher, 55 Minn. 501, 57 N. W. 152, the reason for requiring a higher degree of care from a carrier to a passenger than from a master to a servant is thus pointed out: "An obvious one is that in the case of the passenger he neither does know, nor is he called on to inform himself, whether the carrier employs competent and careful servants and fit and proper machinery and means of performing the service, but he commits himself unreservedly to the care of the carrier; while the servant in most cases may know, and, if the matter is open to observation, is bound to know, whether the machinery and appliances employed by the master are fit and proper."

[7] "Highest degree of care and diligence and skill." Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209, 9 South. 363; Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 South. 495; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 South. 722; Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 South. 902; Georgia Pac. R. Co. v. Love, 91 Ala. 432, 8 South. 714. See Gadsden & A. U. Ry. Co. v. Causler, 97 Ala. 235, 12 South. 439. "Highest practical degree of care, diligence, and skill." St. Louis, I. M. & S. Ry. Co. v. Sweet, 57 Ark. 287, 21 S. W. 587; St. Louis & S. F. R. Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883. But see George v. Railway Co., 34 Ark. 613; Little Rock & F. S. R. Co. v. Miles, 40 Ark. 298; Railway Co. v. Sweet, 60 Ark. 550, 31 S. W. 571. "Utmost care which is consistent with the nature of the business." Murray v. Railroad Co., 66 Conn. 512, 34 Atl. 506; Derwort v. Loomer, 21 Conn. 245; Hall v. Steamboat Co., 13 Conn. 320. "Highest degree of care and prudence which is consistent with the practical operation of their road and the transaction of their business." Chicago, P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204; Tuller v. Talbot, 23 Ill. 357. "Highest degree of care and skill." Moore v. Des Moines & Ft. D. R. Co., 69 Iowa, 491 30 N. W. 51; Kellow v. Railroad Co., 68 Iowa, 470, 23 N. W. 740, and 27 N. W. 466; Raymond v. Railway Co., 65 Iowa, 153, 21 N. W. 495; Sales v. Stage Co., 4 Iowa, 546. "Highest degree of care." Louisville & J. Ferry Co. v. Nolan, 135 Ind. 60, 34 N. E. 710; Louisville, N. A. & C. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284; Bedford, S., O. & B. R. Co. v. Rainbolt, 99 Ind. 551. "Highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted." Southern K. Ry. Co. v. Walsh, 45 Kan. 653,

§ 10. STANDARD OF CARE.

The courts have long ago laid down the rule that in cases of negligence defendant's conduct must be measured by the foresight and caution of the average pru-

26 Pac. 45; Union Pac. Ry. Co. v. Hand, 7 Kan. 380. "Utmost care and skill which prudent men are accustomed to use under like circumstances." Louisville City Ry. Co. v. Weams, 80 Ky. 420; Louisville & N. R. Co. v. Ritter's Adm'r, 85 Ky. 368, 3 S. W. 591. "The diligence which a good specialist in that particular line of business would exercise." Lehman v. Railroad Co., 37 La. Ann. 705; Hanson v. Transportation Co., 38 La. Ann. 111. "Are bound to use greater than ordinary care,—such care as is used by very cautious persons." Libby v. Railroad Co., 85 Me. 34, 26 Atl. 943; Knight v. Railroad Co., 56 Me. 234; Edwards v. Lord, 49 Me. 279. "Not the utmost and highest absolutely, but the highest which is consistent with the nature of their business." Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 20. "Utmost care and diligence in providing against those injuries which human care and foresight can guard against." Dodge v. Steamboat Co., 148 Mass. 219, 19 N. E. 373; Warren v. Railroad Co., 8 Allen (Mass.) 227; White v. Railroad Co., 136 Mass. 321; McElroy v. Railroad Corp., 4 Cush. (Mass.) 400. "Greatest care and foresight." McLean v. Burbank, 11 Minn. 277 (Gil. 189). "That care, prudence, and caution which a very careful and prudent person would use and exercise in a like business and under like circumstances." Smith v. Railroad Co., 108 Mo. 243, 18 S. W. 971; O'Connell v. Railway Co., 106 Mo. 482, 17 S. W. 494; Willmott v. Railway Co., 106 Mo. 535, 17 S. W. 490; Leslie v. Railway Co., 88 Mo. 50; Gilson v. Railway Co., 76 Mo. 282; Morrissey v. Ferry Co., 43 Mo. 380; Powers v. Union Ry. Co., 60 Mo. App. 481; Jacquin v. Cable Co., 57 Mo. App. 320; Haderlein v. Railroad Co., 3 Mo. App. 601, Append. "Highest degree of practicable care." Kennon v. Gilmer, 5 Mont. 257, 5 Pac. 847. "Extraordinary care, and the utmost skill, diligence, and human foresight." Spellman v. Transit Co., 36 Neb. 890, 55 N. W. 270. "Utmost care and diligence of very cautious persons." Taylor v. Railway Co., 48 N. H. 304. "Every precaution which human skill, care, and foresight can provide." Caldwell v. Steamboat Co., 47 N. Y. 282, affirming 56 Barb. 425; Hegeman v. Railroad Corp., 13 N. Y. 9, 24; Brockway v. Lascala, 1 Edm. Sel. Cas.

dent man standing in defendant's shoes. It therefore follows, whenever an adult of sound mind is charged with negligence, that it is no defense that he acted bona fide and to the best of his judgment. This rule was formally and decisively announced in Vaughan v.

(N. Y.) 135. "High degree of care." Lambeth v. Railroad Co., 65 N. C. 494. "Greatest care that persons do who are engaged in business of the same character." Brooklyn St. R. Co. v. Kelley, 6 Ohio Cir. Ct. R. 155. "All that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted." Elliott v. Railway Co., 18 R. I. 707, 28 Atl. 338, and 31 Atl. 694; Boss v. Railroad Co., 15 R. I. 149, 1 Atl. 9. "Such a high degree of foresight, as to possible dangers, and such a high degree of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under the same circumstances." International & G. N. R. Co. v. Welch, 86 Tex. 203, 24 S. W. 390; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95, 10 S. W. 325; International & G. N. R. Co. v. Underwood, 64 Tex. 463; Houston & T. C. R. Co. v. Corbett, 49 Tex. 573; Texas & P. Ry. Co. v. Davidson, 3 Tex. Civ. App. 542, 21 S. W. 68; Fordyce v. Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181; Texas Cent. R. Co. v. Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962; Fordyce v. Withers, 1 Tex. Civ. App. 540, 20 S. W. 766; Dallas C. T. Ry. Co. v. Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925; Texas & P. Ry. Co. v. Orr. (Tex. Civ. App.) 31 S. W. 696; Gulf, C. & S. F. Ry. Co. v. Stricklin (Tex. Civ. App.) 27 S. W. 1093; Fort Worth & D. C. Ry. Co. v. Kennedy (Tex. Civ. App.) 35 S. W. 335. "Greatest possible care and diligence." Baltimore & O. R. Co. v. Noell's Adm'r, 32 Grat. (Va.) 394; Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Grat. (Va.) 431; Farish v. Reigle, 11 Grat. (Va.) 697, 712. "Highest degree of care and prudence." Sears v. Railway Co., 6 Wash. 227, 33 Pac. 389, 1081. "Greatest possible care and diligence." Searle v. Railway Co., 32 W. Va. 370, 9 S. E. 248. "The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill." Pennsylvania Co. v. Roy, 102 U. S. 451; Goble v. Railroad Co., Fed. Cas. No. 5,488a; Meyer v. Railway Co., 4 C. C. A. 221, 54 Fed. 116; Philadel-

Menlove.[1] In that case Tindall, C. J., said: "Instead of saying that the liability for negligence should be co-extensive with the judgment of each individual,—which would be as variable as the length of the foot of each individual,—we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

This principle applies with full force to carriers of passengers. "Conduct actuated by good faith and an honest purpose to avoid injury to passengers is not equivalent to the highest care, or even necessarily of ordinary care. It is not what a man sincerely intends doing, and does with sincere purpose to a given end,

phia & R. R. Co. v. Derby, 14 How. 485; The New World, 16 How. 469, 474. "High degree of care." Readhead v. Railway Co., L. R. 4 Q. B. 393. In an earlier English case Chief Justice Erle charged the jury: "Carriers are intrusted with most important interests,—with human lives,—and a jury may reasonably require an amount of care proportionate to those interests. At the same time a jury would not be entitled to expect the utmost care that could possibly be conceived, or the highest possible degree of skill. It is to be borne in mind that railways themselves are of recent introduction, and that their management is a matter of experience and of practical knowledge which increases day by day. It is not to be expected that the directors shall at once have in use every invention or discovery of science. It is sufficient if they use every precaution in known practical use for the safety and convenience of passengers." Ford v. Railway Co. (1862) 2 Fost. & F. 730.

§ 10. [1] 3 Bing. N. C. 475, decided in 1837. See, also, Com. v. Pierce, 138 Mass. 165, where Holmes, J., said: "If a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly-defined exception to general rules, the law deliberately leaves his personal equation or idiosyncracies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation."

that determines whether in doing it he has exercised the care demanded by the situation, but the inquiry is to be resolved upon a further consideration of the acts themselves. A negligent act is none the less negligently performed because of the good faith which characterizes it." [2] Hence the fact that trainmen did all they thought necessary to ascertain whether a grade crossing with another railroad was clear does not relieve the company from liability for injuries to a passenger in a collision, if they in fact did not do all that the dictates of the utmost prudence would have suggested to be done.[3]

An apparent exception to this principle exists where a man is confronted with a sudden peril. In such a case his failure to exercise the best possible judgment does not establish lack of care and skill on his part. This rule is most frequently applied in favor of plaintiffs charged with contributory negligence,[4] but it was recently applied by the New York court of appeals in favor of a carrier of passengers charged with negligence.[5]

§ 11. HIGHEST PRACTICABLE CARE.

That the degree of care required of passenger carriers does not extend beyond the highest practicable degree of care finds many illustrations in the decided cases. For instance, it is not required that the road-

[2] Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 South. 495.

[3] Id.

[4] See post, §§ 185-188.

[5] Wynn v. Railroad Co., 133 N. Y. 575, 30 N. E. 721, reversing (Com. Pl.) 14 N. Y. Supp. 172.

bed of railroads should be laid with ties of iron and cut stone, though in that way the danger arising from wooden ties subject to decay would be avoided.[1] Nor is it required that railroad embankments be constructed of such a width that a derailed train or car will stop before reaching the edge.[2]

§ 12. UNFORESEEN ACCIDENTS.

Since carriers of passengers are bound to use only the highest degree of care reasonably to be expected from human foresight, it follows that they are not bound to guard against accidents which human foresight cannot reasonably anticipate. The test of liability is not whether the carrier used such particular foresight as is evident, after the accident, might have averted injury, but whether it used that degree of care and prudence which very cautious and prudent persons would have used, under the apparent circumstances of the case, to prevent the accident, without reasonable knowledge that it was likely to occur.[1] "It is always

§ 11. [1] Pittsburg, C. & St. L. R. Co. v. Thompson, 56 Ill. 138; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291.

[2] Pershing v. Railway Co., 71 Iowa, 561, 566, 32 N. W. 488. Negligence on the part of a street-car driver is the want of such care as a reasonably skillful and prudent street-car driver would observe under similar circumstances; and, where the only negligence complained of by a passenger is the negligence of the driver, the court is not bound to instruct further as to the degree of care required of street railways generally. Durnett v. Railway Co. (Tex. Civ. App.) 37 S. W. 336.

§ 12. [1] Libby v. Railroad Co., 85 Me. 44, 26 Atl. 943; Bowen v. Railroad Co., 18 N. Y. 408; Fredericks v. Railroad, 157 Pa. St. 103, 27 Atl. 689. It is the duty of a street railway, in the construction of its cars, to provide against every danger to passengers that is probable and to

a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event." [2] Perhaps, the most striking illustration of this rule is found in the case of Cleveland v. New Jersey Steamboat Co.,[3] which was in the courts of New York for many years. As a ferryboat swung from its wharf, a man attempted to jump to the shore, and fell into the water. There was a cry of "Man overboard!" accompanied with an instantaneous rush of passengers to the side of the boat whence the cry proceeded, and plaintiff was shoved overboard, through an open gate, in the rush. The court of appeals finally held that the failure to guard against such an accident by closing the gate before the boat started from the wharf was not sufficient evidence of negligence to take the case to the jury. "The combination of circumstances was so extraordinary that the failure to foresee their possibility, and to guard against their happening, cannot, in any fair and proper view, be called negligence." [4]

As a corollary to this general proposition, it may be stated that where an appliance used in the carriage of

be reasonably apprehended, but not against such as are so remote as to be barely possible. Keller v. Railway Co., 149 Pa. St. 65, 24 Atl. 159.

[2] Bramwell, B., in Corriman v. Railroad Co., 4 Hurl. & N. 781, 786. Put, in an action for injuries sustained by the sudden starting of a car while alighting, it is proper to refuse to charge that passenger carriers are not bound to adopt such particular precautions as it is apparent, after the accident, might have prevented the injury. Wheaton v. Railroad Co., 36 Cal. 590.

[3] 125 N. Y. 299, 26 N. E. 327, reversing 7 N. Y. Supp. 28; s. c. 68 N. Y. 306, 89 N. Y. 627, 7 N. Y. St. Rep. 598, and 5 Hun, 523.

[4] Cleveland v. Steamboat Co., 125 N. Y. 299, 26 N. E. 327.

passengers is not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe, and convenient, it may be continued without the imputation of negligence.[5] Thus the fact that the bottom of the railing around a steamer's deck is two feet above the deck will not render the steamship company liable for the death of a passenger, who slipped through this open space while trying to recover his hat, which had been blown off by the wind.[6] Nor is it negligence for an elevated railroad company to maintain a guard rail at the end of its station platform of such a height as to strike a passenger who clings to a moving train.[7]

But it should be borne in mind that the question is not whether the peril was one to which passengers had

[5] Lafflin v. Railroad Co., 106 N. Y. 136, 12 N. E. 599; Illinois Cent. R. Co. v. Hobbs, 58 Ill. App. 130. The proposition is quite well established by authority that it is competent to prove as to a structure not apparently dangerous, and which has been in use a considerable time, that no accident has occurred from its use or maintenance prior to the time of an accident resulting in an injury to a person, and attributable to it, although such person was at the time a passenger of the party sought to be charged with liability for the injury. Wilder v. Railway Co., 10 App. Div. 364, 41 N. Y. Supp. 931.

[6] Dougan v. Transportation Co., 56 N. Y. 1, affirming 6 Lans. (N. Y.) 430. The same principle was applied where a child slipped between the upper and lower rails of the guards alongside a ferry bridge, and fell into the water. Loftus v. Ferry Co., 84 N. Y. 455, affirming 22 Hun, 33.

[7] Robinson v. Railway Co. (Com. Pl.) 25 N. Y. Supp. 91. A railroad company is not chargeable with negligence in constructing a cinder platform at its station, the distance between which and the lower car step is from 20 to 23 inches, and it is not liable to a passenger who, from some unexplained cause, sprained his knee while boarding a train when stationary at this place. Illinois Cent. R. Co. v. Hobbs, 58 Ill. App. 130. It is the duty of a street railway, in the construction of its cars, to provide against every danger to passengers that is probable or

long been subjected, but whether it is such as might and ought, in the exercise of reasonable diligence, to have been known to and guarded against by the carrier, in the exercise of that high degree of care which it owes to its passengers.[8] "Accidents sometimes are extraordinary in their character, and it is difficult to anticipate their occurrence; but, if there be negligence or want of the proper degree of caution and prudence on the part of the carrier, the extraordinary nature of the accident will not excuse from liability. The very object of the strictness of the rule in requiring the highest degree of care and foresight to be exercised is to avoid all possible accidents and injury." [9] Thus, where a passenger, riding on the platform of an elevated car, was jostled into the opening between two cars, the fact that the road had been in operation for six years, and that 300,000 passengers had been carried daily, without an accident of this kind happening before, is not conclusive in the company's favor on the question of negligence, but it is for the jury to determine whether or not the company should have foreseen the danger of such

to be reasonably apprehended, but not against such as are so remote as to be barely possible. Keller v. Railroad Co., 149 Pa. St. 65, 24 Atl. 159.

[8] Illinois Cent. R. Co. v. O'Connell, 59 Ill. App. 463, affirmed in 160 Ill. 636, 43 N. E. 704.

[9] Metropolitan R. Co. v. Falvey, 5 App. D. C. 176. In this case it appeared that an open summer car was so constructed that the seats projected beyond the floor at the sides, and a rail placed at the side to prevent passengers from falling off was 18 inches above the floor. A four year old child, getting up from the seat, fell from the car, through this open space, between the floor and the rail, and was injured. Held, that the question whether the car was properly constructed was for the jury.

an accident, and guarded against it.[10] So, although the death of a passenger could not reasonably be anticipated from the use of a stool in alighting from a train, yet if the use of the stool was negligence on the part of the company, without contributory negligence by deceased, and the injury was the proximate result of that negligence, the company is liable.[11]

§ 13. DUTY TO ADOPT NEW DEVICES—FINANCIAL ABILITY.

Carriers of passengers are bound to adopt such apparatus and appliances as science and skill shall from time to time make known, and experience shall prove to be valuable in a considerable degree in diminishing the dangers of railroad travel, provided such improvements can be procured at reasonable expense.[1] And when a railroad company finds out an expedient far better than an old one, the company is not, except in very peculiar cases, to wait till it has used up the old plant, but it is bound to adopt the new method at once.[2] Thus it has been held that the failure of a railroad company, earning dividends, to equip its passenger trains with the Westinghouse air brakes, which had been fully tested and gone into general use throughout the United States, was evidence of negligence.[3] So, too,

[10] Merwin v. Railway Co., 48 Hun, 608, 1 N. Y. Supp. 267, affirmed in 113 N. Y. 659, 21 N. E. 415.

[11] Gulf, C. & S. F. R. Co. v. Southwick (Tex. Civ. App.) 30 S. W. 592.

§ 13. [1] Kentucky Cent. R. Co. v. Thomas (1880) 79 Ky. 160, and cases cited.

[2] Hanson v. Railway Co. (1872) 20 Wkly. Rep. 297.

[3] Kentucky Cent. R. Co. v. Thomas, supra.

the failure to equip a passenger elevator with an air cushion to resist a fall—a device known to the proprietor of the elevator—was held evidence of negligence.[4]

To a certain extent, however, the duty of carriers to adopt expensive devices for the safety of passengers is limited by their financial ability, and the character of their business. "A common carrier of passengers contracts in law that the kind of conveyance he adopts shall be a reasonably safe and convenient mode of transportation, for its kind. The modes of conveyance in use by passenger carriers, both by land and water, vary as the exigencies of the traffic and its remunerative character require and justify. To require all carriers to adopt alike expensive provisions for the safety of passengers, without reference to the nature of their employment, or the amount of their business, would be impracticable and absurd. It would be like requiring the public highways in the commonwealth to be kept in a like state of repair, without reference to the nature of the country through which they pass, or the amount of travel which they accommodate." "If the means of transportation are adapted to the reasonably safe carriage of passengers upon that particular kind of conveyance, and the carrier exercises the utmost skill in the use of such means, he has discharged his legal obligation." [5] A railway constructed through a thinly-set-

[4] Hodges v. Percival, 132 Ill. 53, 23 N. E. 423.

[5] Le Barron v. Ferry Co., 11 Allen (Mass.) 312. In this case the failure of a ferry company to adopt an improved drop, in use by another ferry company, was held not to be negligence per se, but a question for the jury. "Railroad companies must keep pace with science and art and modern improvements in their application to the carriage of pas-

tled country, moving but little freight and few passengers, and running its trains at a low rate of speed, cannot be expected to be equipped and operated in the same manner as is necessary in the case of a railway running through a densely populated territory, and moving a large volume of traffic.[6] Thus it has been held that the rule requiring a carrier to exercise the highest degree of care does not necessitate the running of separate trains for passenger traffic, if the business of the railroad company is not sufficient to warrant it in doing so.[7] So a short-line road, doing a small business, and running only mixed trains, is not required to apply all the delicate checks and guards that are in use.[8]

But while poverty may be an excuse for not adopting all minute safety devices, or for not running separate passenger and freight trains, railroad companies are bound to furnish a roadbed and equipment reasonably safe for travel, entirely independent of any question of financial ability. It has been held that the inability of a railroad company, for want of means, to build a sound bridge, is no defense in an action for injuries to a passenger caused by the giving way of the bridge; for the company ought not to have undertaken to carry passengers until it could do so with safety.[9] Nor will a railroad company be permitted to show that

sengers, but are not responsible for the unknown, as well as the new." Meier v. Railroad Co., 64 Pa. St. 225.

[6] Arkansas M. Ry. Co. v. Canman, 52 Ark. 517, 13 S. W. 280; Kentucky Cent. R. Co. v. Thomas, supra.

[7] Arkansas M. Ry. Co. v. Canman, 52 Ark. 517, 13 S. W. 280.

[8] International & G. N. Ry. Co. v. Copeland, 60 Tex. 325.

[9] Oliver v. Railroad Co., 1 Edm. Sel. Cas. (N. Y.) 589.

it had furnished its passengers with a more expensive roadbed and equipment than its business would warrant.[10]

§ 14. CUSTOM AND PRACTICE OF OTHER CARRIERS.

Though the practice of the best and most skillfully operated railroads in the country is not the test by which to determine whether a railroad carrier has exercised the requisite degree of care, yet, if the practice of the railroads so managed has been found by actual experience to be sufficient and safe, other roads, whose business is to be carried on under like circumstances, are warranted in adopting them. "To hold otherwise would be to hold that railroad companies, in the construction and operation of their roads, could not avail themselves of the experience of others, and that the construction and operation of every road must, to a great extent, be a matter of experiment." [1]

But the practice of other lines cannot serve for comparison on a question of diligence, unless it is shown that these lines are properly equipped and managed, or are so recognized and reputed to be by experts in the business.[2] And if the appliances used by a railroad

10 Gulf, C. & S. F. R. Co. v. Southwick (Tex. Civ. App.) 30 S. W. 592.

§ 14. 1 Pershing v. Railroad Co., 71 Iowa, 561, 569, 32 N. W. 488. In an action for injury to a passenger caused by the breaking of a brake chain, it is error to charge that the "appliances used by defendant must be the best that skill and science have contrived, and which are in practical use," where there is no evidence that any other or safer appliances than those used by defendant were in use. Wynn v. Railroad Co., 10 App. Div. 13, 41 N. Y. Supp. 595. As to evidence of custom and usage, see post, § 448.

2 Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406.

company in its passenger traffic are obviously unsafe, the use of similar appliances on other roads will not absolve it from liability.[3] Thus a railroad company which has failed to construct a platform at one of its usual stopping places, and which compels passengers, in alighting, to use a narrow box, having a surface of about one square foot, is not absolved from liability, as matter of law, by the fact that such boxes are in general use on railroads, and that the box in question had been used by passengers for a long time without an accident.[4] So it is negligence to carry an extra coupling pin on a car platform in such a way as to project two or three inches above the platform, and the company is liable for injuries to a female passenger, whose dress caught in the projecting pin as she was about to alight, and who was thrown to the ground, though the pin was in the place where extra pins are usually and customarily carried, and though no accident had ever before happened by reason thereof.[5]

[3] Dougherty v. Railway Co., 128 Mo. 33, 30 S. W. 317.

[4] Missouri Pac. Ry. Co. v. Worthan, 73 Tex. 25, 10 S. W. 741. "It would be unreasonable to say that a small box or stool which presented the surface of about one square foot, and rested upon a base but a little more extensive, and which was shown to be capable of being overturned at least by an incautious step, could be as safe as a platform, such as is in ordinary use among railroads. If it were not, the jury were authorized to find that the company had not exercised the degree of care required of them." So the fact that for eight months a railroad company persisted in the dangerous practice of throwing mail sacks from its moving trains on a station platform is not conclusive that it is not negligent to do so. Hughes v. Railway Co., 127 Mo. 447, 30 S. W. 127.

[5] Illinois Cent. R. Co. v. O'Connell, 59 Ill. App. 463, affirmed 160 Ill. 636, 43 N. E. 704.

Upon the other hand, where a passenger charges a carrier with negligence in using an unsafe appliance, the use of safer appliances by other carriers is an element to be considered by the jury on the question of negligence. For example, the question whether it is negligence in a steamship company to leave the rudder chain exposed on the deck of its vessel is for the jury, where there is evidence that the rudder chain is generally boxed in on well-constructed steamers.[6] But an omnibus proprietor is not chargeable with negligence because there is no back to an omnibus step; those without backs, as well as those with backs, being in general use, and each having its advantage and disadvantage; the solid back, while preventing all possibility of the foot slipping through, being more liable to fill with mud and snow, and cause the foot to slip, and it not appearing that there had ever been another accident by a person's foot slipping through an open back step.[7]

§ 15. ACT OF GOD AND OF PUBLIC ENEMY.

A common carrier of passengers, who is not an insurer of the passenger's safety, and is liable only for negligence, is of course entitled to the exemption enjoyed by a common carrier of property, whose liability as an insurer does not extend to the act of God or of

[6] Garoni v. Compagnie Nationale (Com. Pl.) 14 N. Y. Supp. 797, affirmed in 131 N. Y. 614, 30 N. E. 865.

[7] Frobisher v. Transportation Co., 151 N. Y. 431, 45 N. E. 839, reversing 81 Hun, 544, 30 N. Y. Supp. 1099. But see contra, with reference to open steps on street cars, Doehncke v. Railroad Co., 3 Misc. Rep. 49, 22 N. Y. Supp. 712.

the public enemies. This subject, so far as it pertains to carriers of passengers, will be discussed in the following chapter.[1]

§ 16. SAME DEGREE OF CARE REQUIRED WHATEVER MODE OF CONVEYANCE ADOPTED.

While the same high degree of care is required of all common carriers of passengers, whatever mode of conveyance is adopted, yet in the application of the rule the law will take into account the nature of the conveyance; and the passenger must assume the usual risks incident to travel by the mode of conveyance he selects, when operated with the requisite degree of care and skill.[1]

§ 15. [1] See post, §§ 32, 33. In Nichols v. Marsland, 2 Exch. Div. 1, it is said: "The ordinary rule of law is that when the law creates a duty, and the party is disabled from performing it, without any default of his own, by the act of God or the king's enemies, the law will excuse him; but when a party, by his own contract, creates a duty, he is bound to make it good, notwithstanding any act of inevitable necessity."

§ 16. [1] Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Topeka City Ry. Co. v. Higgs, 38 Kan. 375, 16 Pac. 667; Schilling v. Railroad Co. (Minn.) 68 N. W. 1083. Of course, no distinction is to be made against a common carrier simply because it is a corporation. A railway company is not charged with a higher degree of care and diligence in the transportation of passengers than is exacted of private individuals under similar circumstances. Gulf, C. & S. F. R. Co. v. Warlick (Indian Ter.) 35 S. W. 235.

§ 17. SAME—FREIGHT AND CONSTRUCTION TRAINS.

Thus one who is accepted as a passenger on a freight train is entitled to the same degree of care due passengers on regular trains, except that in taking the freight train the passenger assumes the usual risks incident to traveling in freight trains managed by prudent and competent men.[1] While life and limb are as valuable, and the right to safety is the same, in the caboose as in the palace car,[2] yet it must be remembered that in the operation of freight trains the primary object is the transportation of freight, and the appliances used are, and are known by the passenger to be, adapted to that business.[3] Hence the law does not require freight

§ 17. [1] McGee v. Railway Co., 92 Mo. 208, 4 S. W. 739; Hazard v. Railroad Co., 1 Biss. 503, Fed. Cas. No. 6,275; Delaware, L. & W. R. Co. v. Ashley, 14 C. C. A. 368, 67 Fed. 209; Ohio & M. R. W. Co. v. Dickerson, 59 Ind. 317; Woolery v. Railway Co., 107 Ind. 381, 8 N. E. 226; Indianapolis, B. & W. Ry. Co. v. Beaver, 41 Ind. 493; Dillingham v. Wood, 8 Tex. Civ. App. 71, 27 S. W. 1074.

[2] Ohio V. R. Co. v. Watson's Adm'r, 93 Ky. 654, 21 S. W. 244.

[3] Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204, citing many cases. "It is neither expected nor required that a passenger on a freight train shall be provided with all the comforts and conveniences which are usually afforded passengers on a regular passenger train; but there is on that account no diminution in the obligation of those in charge of the freight train to carry its passengers with becoming and all necessary care, and to deliver them safely at, or conveniently near, their respective places of destination. It is the duty of a railroad company engaged in the transportation of passengers, whether by freight or passenger trains, to so run and manage its trains, and so handle its passengers, that no one shall be injured by its own negligence." New York, C. & St. L. Ry. Co. v. Doane, 115 Ind. 435, 439, 17 N. E. 913. See, also, Chicago, B. & Q. R. Co. v. Haz-

trains to be fitted out with air brakes and bell pulls, nor a brakeman to be stationed on every car, for that would destroy the use of the train for its primary purpose; but the law does emphatically require that the highest degree of care be exercised that is practicable and consistent with the efficient use of the means and appliances adopted.[4] One who voluntarily takes passage on a freight train takes the risk of any jolts or jars that may occur on such a train not caused by the negligence of train hands, but which are usual and consequent on such mode of travel.[5]

zard, 26 Ill. 373; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860.

[4] Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204. When the caboose which is usually attached to the freight train is in the repair shop, and a common box car, with temporary rude seats, is substituted to accommodate passengers, and the use of such box car is more dangerous, the degree of care on the part of the company to prevent the starting of the train with a violent jerk is thereby increased. Missouri Pac. Ry. Co. v. Holcomb, 44 Kan. 332, 24 Pac. 467. A railroad company which undertakes to transport stock drovers on the top of its freight trains must manage and run the train with skill and prudence in order to prevent their being thrown off. The degree of care and diligence in running and managing the train must correspond, in a measure, with the mode of conveyance adopted by the company and the person or thing to be conveyed. There may be great negligence in subjecting a train, conveying passengers on top of the cars, to certain jerks and bumps which could not affect the safety of passengers transported in inclosed cars. Tibby v. Railroad Co., 82 Mo. 292. A passenger on a cattle train is entitled to demand the highest degree of care and diligence, the same as if he had taken any other train. Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291.

[5] Crine v. Railroad Co., 84 Ga. 651, 11 S. E. 555; Guffey v. Railroad Co., 53 Mo. App. 462. One who rides on a freight train without payment of fare, and who goes on an open flat car, rather than in the

In Mississippi it is enacted that railroad companies shall not be liable for injury to "any passenger upon any freight train, not being intended for both passengers and freight," "except for the gross negligence or carelessness of its servants." [6] It has been held that a train which is strictly a freight train, with only the appliances of such a train, on which persons are not sought to be induced to take passage by the offer of other accommodations than are afforded by freight trains, cannot be said to be intended for both passengers and freight, though persons may become passengers by going into the caboose; and that consequently, for injuries to a passenger riding in the caboose, the company is liable only if caused by the gross negligence or carelessness of its servants.[7]

Where a railroad has not yet been opened for regular passenger traffic, and only a mixed construction and passenger train is operated, the company cannot be expected to apply all the checks and guards that are in use on established passenger lines; and a passenger, who knows the facts, will be presumed to take

passenger coach attached to the train, is only entitled to such security as that mode of conveyance affords, and cannot recover for injuries sustained by a spark or cinder emitted from the locomotive striking his eye. Higgins v. Railroad Co., 73 Ga. 149. Failure to have a bell rope on a way freight and mixed accommodation train will not justify the jury in finding the company negligent, where all the evidence shows it to have been impracticable, owing to taking in or setting out cars at stations, the varying length of the train, the danger to brakemen from the bell rope, and the difficulty of pulling it on long trains. Oviatt v. Railway Co., 43 Minn. 300, 45 N. W. 436.

[6] Ann. Code Miss. 1892, § 3557.

[7] Perkins v. Railroad Co., 60 Miss. 726.

such risks as are necessarily incident to the new condition of the track and the train on which he travels.[8]

§ 18. SAME—STREET CARS.

The rule requiring the highest degree of care applies not only to carriers of passengers operating steam railroads, but also to those operating street cars and other vehicles drawn by horses.[1] There is a dictum to the contrary in one of the New York cases,[2] and also a decision that only ordinary care for the safety of the passenger is required at the hands of street-car lines operated by horse power.[3] But the great weight of authority, even in New York, requires the highest degree of care,[4] bearing in mind that care and negligence are

[8] San Antonio & A. P. Ry. Co. v. Robinson, 79 Tex. 608, 15 S. W. 584. A railroad company which carries passengers on construction trains must exercise the same degree of diligence, with that character of trains, as with its regular passenger coaches, for the safety of the persons and lives of its passengers. Ohio & M. R. Co. v. Muhling, 30 Ill. 9.

§ 18. [1] Heucke v. Railroad Co., 69 Wis. 401, 34 N. W. 243; Van de Venter v. Railroad Co., 26 Fed. 32; Louisville Ry. Co. v. Park, 96 Ky. 580, 29 S. W. 455; Sullivan v. Railway Co., 133 Mo. 1, 34 S. W. 566; Brown v. Railway Co. (Wash.) 47 Pac. 890; West Chicago St. R. Co. v. Nash, 64 Ill. App. 548. As to its passengers, a street-railway company is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed and the dangers to be naturally apprehended; and it is error to instruct that only ordinary care is required. Payne v. Railway Co., 15 Wash. 522, 46 Pac. 1054.

[2] Unger v. Railroad Co., 51 N. Y. 501.

[3] Stierle v. Railway Co. (Com. Pl.; 1895) 34 N. Y. Supp. 185, Pryor, J., dissenting.

[4] Maverick v. Railroad Co., 36 N. Y. 378; Coddington v. Railroad Co., 102 N. Y. 66, 5 N. E. 797.

relative terms,[5] and that the means and instrumentalities used to protect the safety of passengers may differ with the different modes of conveyance.[6] The rule itself extends to the management of the cars and track, and to all arrangements necessary for the safety of passengers as respects accidents from collision or otherwise.[7]

When electricity is used as the motive power, the rule is applied in all its strictness.[8] "The agent employed, common experience has taught, is one dangerous to life, even when the utmost skill and prudence of best trained electricians are exercised. It is a subtle, imponderable, death-dealing element or fluid. Of its nature or the laws governing it very little is known, even among the few most advanced in the study of it. It may be harnessed, utilized as a motive power, and made to perform much economic service in mechanics, but as to its nature and vagaries nothing is known. It is full of surprises, and deals injury and death under what is deemed the most prudent management, and under what are supposed to be the circumstances least liable to inflict injury. In the use of

5 Dougherty v. Railroad Co., 81 Mo. 325.

6 Topeka City Ry. Co. v. Higgs, 38 Kan. 375, 16 Pac. 667.

7 Smith v. Railway Co., 32 Minn. 1, 18 N. W. 827. At a crossing of a street railway and an ordinary steam railroad, the street railway, for the safety of its passengers, is bound to exercise the highest degree of care and prudence, and the utmost human skill and foresight, to guard against collision with engines on the steam railroad. Coddington v. Railroad Co., 102 N. Y. 66, 5 N. E. 797.

8 Cogswell v. Railroad Co., 5 Wash. 46, 31 Pac. 411; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269.

such an agent, extraordinary care in its management is required." [9]

§ 19. SAME—STAGE COACHES.

Very stringent terms have been employed by the courts in laying down the rule with respect to carriers by stage coach. Stage coach proprietors, who carry passengers for compensation, are responsible for all injuries and accidents to passengers which might have been prevented by human care and foresight. They are consequently bound to furnish good and strong coaches and harness, gentle and well-broken horses, skillful and prudent drivers, and the smallest degree of negligence in these particulars will render the proprietors liable for any injury to passengers.[1]

§ 20. SAME—VESSELS.

The rule that common carriers of passengers are bound to use a high degree of care applies to carriers transporting passengers on sailing vessels,[1] as well as on steamboats [2] and ferryboats.[3] The rule extends to

[9] Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269.

§ 19. [1] Frink v. Coe, 4 G. Greene (Iowa) 555; Peck v. Neil, 3 McLean, 22, Fed. Cas. No. 10,892; Maury v. Talmadge, 2 McLean, 157, Fed. Cas. No. 9,315; Gallagher v. Bowie, 66 Tex. 265, 17 S. W. 407; Ryan v. Gilmer, 2 Mont. 517.

§ 20. [1] The Oriflamme, 3 Sawy. 397, Fed. Cas. No. 10,572.

[2] Russ v. The War Eagle, 14 Iowa, 363; Sherlock v. Alling, 44 Ind. 184.

[3] Hazman v. Improvement Co., 50 N. Y. 53, affirming 2 Daly, 130.

all the machinery and arrangements connected with the boats, and to their management and navigation.[4]

§ 21. SAME—PASSENGER ELEVATORS.

Within the past few years, the courts have exacted from proprietors of passenger elevators the highest degree of care for the safety of passengers. It is held that no distinction in principle exists between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stage coaches, and one who carries them vertically, by means of a passenger elevator.[1]

§ 22. NO DISTINCTION BETWEEN DIFFERENT CLASSES OF PASSENGERS.

The law makes no distinction, as to the degree of care required for the safety of passengers, between those traveling on first-class tickets and those traveling in a lower class for a smaller fare. The law imposes on carriers of passengers the highest degree of practicable care, and no distinction has ever been made between carriers of particular classes of passengers.[1]

4 Sherlock v. Alling, 44 Ind. 184; Hazman v. Improvement Co., 50 N. Y. 53, affirming 2 Daly, 130. See, also, post, § 405.

§ 21. 1 Mitchell v. Marker, 10 C. C. A. 306, 62 Fed. 139; Id., 54 Fed. 637; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266; Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873. See, also, post, § 209.

§ 22. 1 Garoni v. Compagnie Nationale (Com. Pl.) 14 N. Y. Supp. 797, affirmed 131 N. Y. 614, 30 N. E. 865. The fact that a passenger travels in an emigrant car, for a less rate of fare than charged on regular passenger cars, does not relieve the carrier of the duty to use due

§ 23. DUTY EXTENDS TO VEHICLES OTHER THAN THE ONE IN WHICH THE PASSENGER IS CARRIED.

Not only must the carrier exercise a high degree of care and skill with reference to the management of the particular vessel or vehicle in which he is carrying his passenger, but he must exercise the same high degree of care in the management of other vessels or vehicles under his control to prevent injury to the passenger. Thus, where a steamboat company owns two vessels, it owes to a passenger in one of them the exercise of the highest degree of care and skill in the management of the other, to prevent a collision between them. It is not sufficient that it uses ordinary care and skill in the management of the other.[1] The same principle applies to the management of railroad trains owned and operated by the same company.[2]

But this high degree of care is required to be exercised by a carrier only towards his own passengers, and not towards the passengers of another company. Thus a street-railroad company is not required to exercise this high degree of care towards the passengers of another company having an intersecting track.[3]

care to see that berths are properly secured in the daytime, so that they will not fall on passengers. Northern Pac. R. Co. v. Hess, 2 Wash. St. 383, 26 Pac. 866.

§ 23. [1] Sherlock v. Alling, 44 Ind. 184.

[2] See post, §§ 88, 89.

[3] Schneider v. Railroad Co., 133 N. Y. 583, 30 N. E. 752, affirming 59 N. Y. Super. Ct. 536, 15 N. Y. Supp. 556.

§ 24. STATUTORY LIABILITY.

Thus far we have been considering what may be called the common law of the subject in hand; that is, the principles evolved by the courts in dealing with common carriers of passengers, independent of any legislation on the subject. In some of the states, however, the duty of the carrier for the safety of his passengers has been defined by statute, but in the main the departure from common-law principles has been slight. Indeed, in Texas it has been expressly enacted that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law, and the remedies against them shall be the same, except where otherwise provided by this title." [1]

§ 25. SAME—CALIFORNIA CODE.

The California Code, which has also been adopted verbatim in several other states, provides that "a carrier of passengers for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of care and skill." [1] This statute practically adopts the common-law rule, and it is held in California that a common car-

§ 24. [1] Sayles' Civ. St. Tex. art. 277. Gen. St. Kan. 1889, par. 1250, provides that railroad companies in this state shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the companies.

§ 25. [1] Civ. Code Cal. § 2100; Code Mont. 1895, § 2790, and Comp. Laws Dak. 1887, § 3838, are identical with this section.

rier of passengers for hire is bound to use the greatest care and diligence in the transportation of passengers, consistent with the carrying on of his business.[2] It has been further held that this statute creates no distinction, as to the degree of care required, between trains devoted entirely to passenger traffic, and mixed trains, carrying both passengers and goods. "Those who travel on mixed trains assume the extra risk necessarily incident to such trains or the traffic; the carrier using such diligence and care as the Code requires on passenger trains, so far as such care is possible, and reasonably consistent with the freight business."[3]

§ 26. SAME—GEORGIA CODE.

The Georgia Code binds a carrier of passengers to "extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers; but he is not liable for injuries to the person after using such diligence."[1] Extraordinary diligence is defined to be "that extreme care and caution which very prudent and thoughtful persons use" in and about similar matters.[2] Under these statutes the carrier is bound to exercise something more than "all

[2] Carr v. Railroad Co., 98 Cal. 366, 33 Pac. 213.

[3] Fisher v. Railroad Co., 89 Cal. 399, 26 Pac. 894. In this connection it should be noted that Civ. Code Cal. § 483, provides that when fare is taken for transporting any passenger on any baggage, wood, gravel, or freight train, the same care must be taken, and the same responsibility is assumed by the corporation, as for passengers on passenger cars.

§ 26. [1] Code Ga. 1882, § 2067.

[2] Code Ga. 1882, § 2062.

ordinary and reasonable care and diligence";[3] but, on the other hand, he is not bound to take the greatest possible degree of care in the discharge of duties to passengers,[4] nor even the utmost care and diligence.[5] "There is a substantial difference between the highest possible degree of human foresight and care and that degree of diligence which is actually observed by very prudent and thoughtful persons."[6] This extraordinary diligence is required, no matter what means of conveyance may be employed to carry the passenger. It applies as well when the passenger is carried on a street car[7] or on a freight train,[8] as it does when he is carried on a regular passenger train. But what may amount to extraordinary diligence with respect to one class of trains may not amount to it with respect to another class. The standard of diligence is the same, but the manner of its exercise must depend upon the circumstances of the case, taking into consideration the character of the train, and the manner in which it is usually made up and run, and in which the cars are usually coupled to one another.[9]

3 Crawford v. Railroad, 62 Ga. 566.

4 East Tennessee, V. & G. Ry. Co. v. Green, 95 Ga. 736, 22 S. E. 658.

5 East Tennessee, V. & G. Ry. Co. v. Miller, 95 Ga. 738, 22 S. E. 660.

6 Id.

7 City & S. Ry. v. Findley, 76 Ga. 311, citing Holly v. Railroad, 61 Ga. 215.

8 Ball v. Mabry, 91 Ga. 781, 18 S. E. 64, citing Crine v. Railway Co., 84 Ga. 651, 11 S. E. 555; Chattanooga R. & C. R. Co. v. Huggins, 89 Ga. 495, 15 S. E. 848.

9 Ball v. Mabry, 91 Ga. 781, 18 S. E. 64.

§ 27. SAME—NEBRASKA STATUTE.

A radical departure from the common law is made by the Nebraska statute. It is enacted that "every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." [1] Though this statute has been in force since 1867, it does not seem to have been given its full effect until lately. In a case decided in 1873, the statute, though relied on in the brief, was ignored by the court, and it was held that a carrier of passengers is liable only for negligence, and that he does not warrant the safety of passengers, but, as far as human care or foresight go, he must provide for their safe conveyance.[2] In later cases, however, it is held that railroad companies are insurers of the safety of their passengers, except as against the gross negligence of such passengers, or the violation of some rule of the company brought to their notice.[3] Under this statute, to warrant a recovery

§ 27. [1] Comp. Laws Neb. 1893, p. 628, c. 72, art. 1, § 3. For criminal carelessness of passenger, see post, § 195.

[2] McClary v. Railroad Co., 3 Neb. 44. The railroad company was held not liable for injuries to a passenger caused by the train being blown from the track by what undoubtedly state loyalty caused the court to call a "sudden gust" of wind.

[3] Chicago, B. & Q. R. Co. v. Landauer, 39 Neb. 803, 58 N. W. 434; Union Pac. R. Co. v. Porter, 38 Neb. 226, 56 N. W. 808; Missouri Pac.

against a railroad company, it is only necessary to show that the person injured was, at the time, being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of the railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that it was the result of the violation of some express rule or regulation of the railroad company, actually brought to the notice of the passenger.[4]

The statute applies, not only to actions by injured passengers, but also to actions by third persons for damages sustained in consequence of such injuries, as by a husband for loss of services, etc., caused by injuries to his wife.[5] But the statute does not seem to be applied to street railroads.[6] It goes without saying that this statute has been vigorously assailed by railroad companies as unconstitutional, but its validity has been uniformly upheld.[7]

§ 28. PROVINCE OF COURT AND JURY

In actions for negligence there may be a dispute (1) as to the existence of the facts relied on to establish negligence; (2) as to the exercise

R. Co. v. Baier, 37 Neb. 235, 55 N. W. 913; Fremont, E. & M. V. R. Co. v. French, 48 Neb. 638, 67 N. W. 472.

[4] Chicago, B. & Q. R. Co. v. Hague, 48 Neb. 97, 66 N. W. 1000.

[5] Omaha & R. V. R. Co. v. Chollette, 41 Neb. 578, 59 N. W. 921.

[6] Spellman v. Transit Co., 36 Neb. 890, 55 N. W. 270.

[7] Omaha & R. V. R. Co. v. Chollette, 41 Neb. 587, 59 N. W. 921; Union Pac. R. Co. v. Porter, 38 Neb. 226, 56 N. W. 808.

of a proper degree of care, assuming or admitting a certain state of facts to exist. As to the first class, the question is always for the jury when there is any conflict in the evidence. As to the second class, by the great weight of authority, the question is also for the jury whenever fair-minded men can honestly and reasonably differ as to the inference to be drawn from the admitted or assumed facts; but, when there is no room for such difference of opinion, the question is one of law for the court.

The proposition that the jury is the proper tribunal to decide an issue of fact depending on conflicting evidence is so elementary that no extended discussion as to the first class mentioned in the black letter text is necessary at this time.[1]

On the question whether the inference of negligence to be drawn from admitted or assumed facts is for the court or for the jury, there are three classes of cases, each laying down conflicting and irreconcilable doctrines.

One extreme class holds that when the facts are undisputed, or when a certain state of facts is assumed to exist, the inference of negligence is always one of law for the court. "When the facts are agreed upon, or otherwise appear, what is ordinary care is a question for the court. When the facts are in dispute, the proper course for the judge is to explain what would be ordinary care under certain hypothesis as to the facts, and have the jury to apply the law to the facts

§ 28. [1] See post, §§ 503–508.

as they find them." [2] This view seems to have prevailed at one time in North Carolina,[3] and perhaps in Virginia.[4]

Another extreme class of cases holds that the inference of negligence from admitted or assumed facts is always for the jury, except when a certain course of conduct is expressly declared negligence by statute. "The

[2] Wallace v. Railroad Co., 98 N. C. 494, 4 S. E. 503.

[3] Smith v. Railroad Co., 99 N. C. 241, 5 S. E. 896; Smith v. Railroad Co., 64 N. C. 235. But lately the supreme court of North Carolina seems to have receded from this position to some extent, at least.

What is negligence is a question of law when the facts are undisputed; but where the facts are controverted, or more than one inference can be drawn from them, it is the province of the jury to pass upon an issue involving it. Tillett v. Railroad Co., 118 N. C. 1031, 24 S. E. 111.

[4] Dun v. Railroad Co., 78 Va. 645, and cases cited. Mr. Justice Holmes, in his Lectures on the Common Law (pages 122, 123), says: "When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay the rule down intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury. But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is or is not blameworthy, and therefore, unless explained, is or is not a ground of liability; or it will find the jury vacillating to and fro, and will see the necessity of making up its mind itself."

cases involving this question are so different in their facts, so various, so complicated, and arising under so many different circumstances, that it would be utterly impossible to lay down any general principle by which every special case could be measured and tested as to the fact of negligence, and which enables the judge to say to the jury, as matter of law, such and such facts showed the absence or presence of ordinary care. The general rule on the subject seems to be that the charge of the judge must simply be that negligence is the absence of ordinary care, and the jury must determine whether the facts proved before them amount to negligence. They must determine what facts have been proved, and then say by their verdict whether these facts amount to the absence of ordinary care." [5] This is the law in South Carolina,[6] in Georgia,[7] and in Texas.[8] In arriving at this conclusion, the courts

[5] Quinn v. Railroad Co., 29 S. C. 381, 7 S. E. 614.

[6] Quinn v. Railroad Co., supra; Bridger v. Railroad Co., 25 S. C. 30; Petrie v. Railroad Co., 29 S. C. 303, 7 S. E. 515, and cases cited.

[7] "This court has repeatedly held for many years that negligence is a question for the jury; that what facts make a case of negligence is a conclusion which the jury must reach without aid from the court; and that the court errs if the judge, in charging the jury, tells them what facts make negligence, and thus reaches a conclusion for them, and instructs them that they must adopt and enforce his conclusi n from the facts, so concluding them on an issue the law gives them to try, and excluding their own judgment of what is negligence in the case before them. The only exception to this long line of decisions on this point is the case where the statute law makes a thing negligence in express terms." Central R. R. v. Thompson, 76 Ga. 770. See, also, Southwestern R. R. v. Singleton, 67 Ga. 306.

[8] "With us it is well settled that, in the absence of statute defining the acts which constitute negligence, then it is a question of fact for the determination of the jury." Galveston, H. & S. A. Ry. Co. v.

have been influenced to some extent by constitutional and statutory provisions prohibiting the judges from charging as to the facts.

Between these two extreme views, the great majority of the courts have taken their stand. It has been held by the house of lords in England, by the supreme court of the United States, and by most of the state courts of last resort, that the test to determine whether the inference of negligence is for the court or for the jury is whether or not there is room for difference of opinion between reasonable and fair-minded men as to what inference should be drawn from the admitted or assumed facts. If there is no room for such difference of opinion, the question is one of law for the court. If there is room for such difference, it is one of fact for the jury. "Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed. Another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists in what they have themselves seen and heard,—the merchant, the mechanic, the farmer, the laborer,—these sit to-

French, 59 Tex. 406. See, also, Texas & P. Ry. Co. v. Murphy, 46 Tex. 356; International & G. N. Ry. Co. v. Ormond, 64 Tex. 485; Gulf, C. & S. F. Ry. Co. v. Bagley, 3 Tex. Civ. App. 207, 22 S. W. 68; San Antonio & A. P. Ry. Co. v. Long, 4 Tex. Civ. App. 497, 23 S. W. 499.

gether, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in what we are considering." [9]

It must be admitted, however, that this test does not bring uniformity into the decisions as to the province of the court and jury in inferring negligence when applied to concrete facts. One court will hold that on a certain class of facts there is no room for difference of opinion between reasonable and fair-minded men as to the inference to be drawn, while another court will hold on the same facts that there is room for such difference. It does seem, however, that the tendency of recent decisions, if not to enlarge the province of the jury, is to arrest the process of curtailing it, and that the courts are not disposed to enlarge the class of cases holding a certain line of conduct to be negligence per se.[10] In the subjoined note are cited the

[9] Railroad Co. v. Stout, 17 Wall. 657, 663, 664.

[10] "This rule must be applied in practice with caution, lest the courts usurp the functions of the jury, and unwittingly deprive a party of his constitutional right to trial by jury." Scheiber v. Railroad Co., 61 Minn. 499, 63 N. W. 1034. "We are constrained to hold that the provision of our constitution which gives parties to an action at law the right to trial by jury embraces even parties who bring actions at law against railroad corporations, and that the persistent effort to push precedents to the point of requiring trial judges to decide

cases laying down the general principle,[11] and in the following pages, as each subject is taken up, an attempt will be made to state what concrete facts have been held to require the inference of negligence to be submitted to the jury, and on what facts the courts have decided this question for themselves.

as questions of law the issues most commonly joined in cases where recovery for personal injuries is sought should not be encouraged." McCormick, J., in New Orleans & N. E. R. Co. v. Thomas, 9 C. C. A. 29, 60 Fed. 379.

[11] "The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the question from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever." Lord Cairns, in Metropolitan Ry. Co. v. Jackson, 3 App. Cas. 193, 197. See, also, Bridges v. Railway Co., L. R. 7 H. L. 213, 221, 233. "A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury. There must be evidence upon which they might reasonably and properly conclude that there was negligence." Toomey v. Railway Co., 3 C. B. (N. S.) 146, 150.

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish." Gardner v. Railroad Co., 150 U. S. 349, 14 Sup. Ct. 140. See, also, Richmond

& D. R. Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, and cases cited; Hathaway v. Railroad (C. C. Ga.) 29 Fed. 489. "When it is said that a given act does or does not constitute negligence in law, the statement means no more than that, in the judgment of all reasonable men,—not judges alone, for it concerns a fact, and not a question of law,—it would be esteemed such. When it can be affirmed that all reasonable men would agree as to the quality of an act in respect of its being either negligent or prudent, the court may give effect to such consensus of opinion, and direct a verdict in accordance therewith. The direction is given, not because it is the judge's opinion alone, but because the judge is able to say that it is also the opinion that all reasonable men would entertain of the question. If there is doubt as to whether all reasonable men would draw the same conclusion from the evidence, then the question must be submitted to the 12 reasonable men appointed by the constitution to determine disputed or doubtful questions of fact." Bronson v. Oakes, 22 C. C. A. 520, 76 Fed. 734. "When, on the undisputed evidence, aided by legitimate inferences which may be drawn from it, the injury to plaintiff was caused by his own negligence, or by accident, without fault on the part of the defendant, the court is not required to submit the question of negligence to the jury, but may give the general affirmative charge in favor of the defendant." Smith v. Railway Co., 88 Ala. 538, 7 South. 119. Where the facts are admitted or proven without contradiction, the court will determine whether or not they establish negligence, or show contributory negligence; but, where the conclusion is open to debate, it is one for the jury, under proper instructions from the court. Stephenson v. Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, and 36 Pac. 407. See, also, Raub v. Railway Co., 103 Cal. 473, 37 Pac. 374. "Where the facts are disputed, where there is any reasonable doubt as to the inference to be drawn from them, or when the measure of duty is ordinary and reasonable care, and the degree varies according to the circumstances, the question cannot, in the nature of the case, be considered by the court; it must be submitted to the jury. But when the facts and inferences are undisputed, when the precise measure of duty is determinate,—the same under all circumstances,—where a rule of duty in a given exigency may be certified and accurately defined, the question is for the court, and not for the jury." Jackson v. Crilly, 16 Colo. 103, 26 Pac. 331, and cases cited. "Where the facts are such that there is room for difference of opinion between reasonable men as to whether or not negligence

should be inferred, the right to draw the inference of negligence or no negligence therefrom is for the jury as one of fact, and not for the court to be inferred as one of law." Cincinnati, L., St. L. & C. Ry. Co. v. Grames, 136 Ind. 39, 34 N. E. 714, overruling earlier cases; Evansville St. Ry. Co. v. Meadows, 13 Ind. App. 155, 41 N. E. 398; Hoehn v. Railroad Co., 152 Ill. 223, 38 N. E. 549; Dewald v. Railroad Co., 44 Kan. 586, 24 Pac. 1101. Where the issue before the jury is upon the negligence of the parties, and the testimony upon the points in controversy is conflicting and uncertain, it is not erroneous for the presiding judge, after stating to the jury, in language to which no exception is taken, the degree of care that is required on either side, and that plaintiff's right to recover depends upon proof to their satisfaction that the injuries were received by the fault of the defendants, without fault on the part of the passenger contributing to the result, to decline, upon request, to determine, as matter of law, whether a certain state of facts, claimed on one side to exist, and denied on the other, would or would not constitute negligence. Hobbs v. Railroad Co., 66 Me. 572. The case must be a very clear one to justify the court in taking upon itself the responsibility of deciding the question of negligence. It must present some decisive act, in regard to the effect and character of which no room is left for ordinary minds to differ. Baltimore & O. R. Co. v. Kane, 69 Md. 11, 25, 13 Atl. 387; Cumberland Val. R. Co. v. Maugans, 61 Md. 53. "The question of ordinary care is in most cases, even where the facts are undisputed, a question of fact, which it is peculiarly the province of the jury to settle. But if, as matter of common knowledge and experience, the courts can see that, upon all the undisputed facts, the plaintiff was not in the exercise of ordinary care, and that the injury he received was in part attributable to his want of it, the jury may properly be told, as matter of law, that he cannot recover." Creamer v. Railway Co., 156 Mass. 320, 31 N. E. 391, and cases cited. See, also, Gavett v. Railroad Co., 16 Gray, 501; Fox v. Sackett, 10 Allen, 535. "If all the circumstances of the case, when the facts are undisputed, are such that ordinarily prudent men would be liable to differ in their views as to the negligence imputed, then such negligence should not be determined by the court, but the question left to the jury, under proper instructions." Ecliff v. Railway Co., 64 Mich. 196, 31 N. W. 180. "Where the facts as to the negligence of a party are undisputed or conclusively proved, and there is no reasonable basis for drawing different conclusions from them, the question is one of law for the court. It is

not sufficient that the facts are admitted, for the decisive test is whether or not fair-minded men could honestly and reasonably differ as to the inferences to be drawn from the admitted facts." Scheiber v. Railway Co., 61 Minn. 499, 63 N. W. 1034. See, also, Oviatt v. Railroad Co., 43 Minn. 300, 45 N. W. 436; Abbott v. Railway Co., 30 Minn. 482, 16 N. W. 363. "Negligence is a mixed question of law and fact. The court declares what is negligence, and the jury finds the facts, in the particular case, and reports to the court what such facts show on the question of negligence, viewed in the light of what the court has declared negligence to be." McMurtry v. Railway Co., 67 Miss. 601, 7 South. 401. "Negligence and contributory negligence are never questions of law, unless the facts are such that all reasonable men must draw the same inference from them." Eichhorn v. Railway Co., 130 Mo. 575, 32 S. W. 993. See, also, Weber v. Railway Co., 100 Mo. 194, 12 S. W. 804, and 13 S. W. 587; Florida v. Car Co., 37 Mo. App. 598; Taylor v. Railway Co., 26 Mo. App. 336. "The rule in this state is well established that questions of negligence and contributory negligence are for the jury where the facts are such that reasonable minds may honestly draw different conclusions therefrom. It is only where opinions cannot reasonably differ as to the inference to be drawn from the facts that the court is justified in withdrawing the case from the jury." Omaha St. R. Co. v. Loehneisen, 40 Neb. 37, 58 N. W. 535; Omaha St. Ry. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007. "The wisdom of the time-honored rule of the common law which refers questions of fact to jurors, and questions of law to the judge, is not more conspicuous in any class of civil cases than in those which involve questions of negligence. Cases of that nature frequently come before the courts, in which men of equal intelligence and judgment differ in their conclusions simply because they differ in experience and habits, in temperament, or mental organization. A course of conduct which seems sufficiently careful to a self-reliant man, who is accustomed to act promptly, may appear reckless to one who is unusually circumspect or hesitating. That average judgment which is the result of the deliberations of twelve men of ordinary sense and experience is recognized by our jury system as a juster standard than the judgment of one man of equal experience and sense in the determination of questions of fact, and is especially valuable in the decision of questions of negligence. On the trial of an issue of that nature, if there is any doubt, however slight, either as to what facts are established by the testimony, or as to the conclusion in re-

spect to the fact of negligence that may be legitimately drawn from the circumstances proved by the average of men of common sense, ordinary experience, and fair intentions, the case should not be taken from the jury. It is only when the case is entirely clear upon the testimony, where there is no room for rational doubt, either as to the circumstances proved, or as to the conclusion of fact which may be properly drawn from them, that a judge is justified in deciding a question of negligence as matter of law." Willis v. Railroad Co., 34 N. Y. 670, 679. See, also, Keller v. Railroad Co., 2 Abb. Dec. 480, affirming 17 How. Prac. 102; Bernhard v. Railroad Co., 1 Abb. Dec. 131, affirming 32 Barb. 165; Filer v. Railroad Co., 49 N. Y. 47; Wolfkiel v. Railroad Co., 38 N. Y. 49. The earlier rule in New York was that when the facts are uncontroverted, the question of negligence is one of law for the court. Gonzales v. Railroad Co., 38 N. Y. 440. "Negligence is the absence of care according to the circumstances, and is always a question for the jury when there is a reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to the circumstances, the question of negligence is necessarily for the jury." Pennsylvania R. Co. v. Peters, 116 Pa. St. 206, 9 Atl. 317, and cases cited; Lehigh Val. R. Co. v. Greiner, 113 Pa. St. 600, 6 Atl. 246, and cases cited. See, also, Arnold v. Railroad Co., 115 Pa. St. 135, 8 Atl. 213; McCully v. Clarke, 40 Pa. St. 399. "Though, generally, the question of negligence is a question of fact to be determined by the jury, yet when there is no controversy about the facts, or when it clearly appears from them what course a person of ordinary prudence would pursue, it is a question for the court. So, too, when the standard of duty is fixed, or when the negligence is clearly defined and palpable." Chaffee v. Railroad Co., 17 R. I. 658, 24 Atl. 141. See, also, Boss v. Railroad Co., 15 R. I. 149, 1 Atl. 9. "In cases where the common experience of mankind and the common consensus of prudent persons have recognized that to do or omit to do certain acts is prolific of danger, we may call the doing or omission of them legal negligence." Carrico v. Railroad Co., 35 W. Va. 389, 14 S. E. 12. "When the facts and circumstances, though undisputed, are ambiguous, and of such a nature that reasonable men, unaffected by bias or prejudice, may disagree as to the conclusions to be drawn from them, then the case should be submitted to the jury. But when such facts and circumstances are not ambiguous, and there is room for two honest and apparently reasonable conclu-

sions, then the court may take the case from the jury. The same rules are applicable to questions of contributory negligence." Hart v. Railroad Co., 86 Wis. 483, 57 N. W. 91, and cases cited. See, also, Patten v. Railroad Co., 32 Wis. 524. "When the law prescribes what shall constitute negligence, or when the act relied on to show negligence is isolated, then negligence becomes a question of law. But when the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it,—no room for opposing inferences." Worthington v. Railroad Co., 64 Vt. 107, 23 Atl. 590.

In conclusion, it should be stated that the failure to observe a statutory requirement, resulting in injury to plaintiff, is generally held to be negligence as matter of law. Thus carrying more passengers on a coach than permitted by statute, by reason of which the axletree broke, was held conclusive evidence of negligence in Israel v. Clark, 4 Esp. 259; and in a very recent case the failure of the employés on a street car to bring it to a stop, and go ahead of it on a crossing with a steam railway to see if the way was clear, was held negligence as matter of law, since a statute required these things to be done. Cincinnati St. Ry. Co. v. Murray (Ohio) 42 N. E. 596. See, however, Blamires v. Railway Co., L. R. 8 Exch. 283.

CHAPTER II.

DUTY OF CARE AS TO MEANS OF TRANSPORTATION.

§ 29. Duty as to Roadbed.
30. Same—Negligence of Employés and Independent Contractors.
31. Same—Act of God.
32. Same—Guarding against Act of God.
33. Same—Acts of Public Enemy.
34. Same—Inspection and Repair.
35. Same—Obstructions.
36. Same—Cattle on Track.
37. Same—Street-Car Tracks.
38. Duty as to Vehicles.
39. Same—Latent Defects.
40. Same—Liability for Negligence of Manufacturer.
41. Same—Inspection.
42. Same—Guarding Car Windows.
43. Same—Car Platforms.
44. Same—Motive Power for Street Cars.
45. Same—Statutory Requirements.

§ 29. DUTY AS TO ROADBED.

A railroad company is bound to exercise the highest degree of practicable care, not only in the construction of its roadbed, but in its inspection, its repair, and in keeping it free from obstructions. But it is not an insurer, and is therefore not liable for defects caused by the act of God or of the public enemy.

Since railroad corporations, under extraordinary grants of franchises, build, control, and generally have the exclusive use of their roadbeds and tracks,

the courts have exacted from them this degree of care with respect to their passengers, whose personal safety depends on a rigid enforcement of the rule.[1] But, though railroad companies must exercise this high degree of care, they are not bound absolutely to provide a roadway free from defect, irrespective of the question of negligence.[2]

The duty in respect to the roadbed extends to every portion of it, including the fills or embankments, the bridges, the cuts, the ties, and the rails.[3] It has even been held that in constructing and maintaining its bridges, a railroad company is required to take into account the fact that accidents, such as the derailment of a train, may occur in the operation of its road, and must construct its bridges with reference thereto, and it must exercise a high degree of care in this re-

§ 29. [1] International & G. N. R. Co. v. Halloren, 53 Tex. 46; McElroy v. Railroad Corp., 4 Cush. 400; Virginia Cent. R. Co. v. Sanger, 15 Grat. 230. It is said in these cases that a carrier of passengers by stage coach is not responsible for the condition of the highway, since it is not under his control or supervision.

[2] McPadden v. Railroad Co., 44 N. Y. 478. "Great care is required from railroad companies in the construction of their roads, but absolute liability for defects has never been charged on them." Libby v. Railroad Co., 85 Me. 34, 26 Atl. 943.

[3] In Gleeson v. Railroad Co., 140 U. S. 435, 11 Sup. Ct. 859, Justice Lamar said: "If it be the duty of the company, as it unquestionably is, in the erection of fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will these same laws cause landslides, and consequent dangerous obstructions to the track itself, from ill-constructed railway cuts."

spect.[4] Moreover, the track must be in a reasonably safe condition, not only for passenger cars, but for all other vehicles which the company may use for the transportation of passengers over it.[5] But, as has already been stated, a railroad company is not bound to guard against unforeseen accidents.[6]

§ 30. SAME—NEGLIGENCE OF EMPLOYES AND INDEPENDENT CONTRACTORS.

A railroad company is answerable to its passengers for negligence in the construction of its roadbed, as well when the negligence is that of its employés as when it is that of independent contractors, their subcontractors, and servants.

That a railroad company has employed competent engineers to supervise the construction of its roadbed and bridges clearly does not exonerate it from the consequences of the negligence of the engineers in the construction, since a master is always liable for the negligence of his servant while acting within the scope of his employment.[1]

[4] Pershing v. Railroad Co., 71 Iowa, 561, 571, 32 N. W. 488.

[5] Pool v. Railway Co., 56 Wis. 227, 233, 14 N. W. 46; Id., 53 Wis. 657, 11 N. W. 15 (hand car).

[6] Ante, § 12. A loaded wagon broke down on a bridge, so as to obstruct a street-car track, and a car was necessarily lifted to the parallel track, and run along it for a short distance, in the opposite direction from which cars were usually moved on that track. Held, that the failure to have the frogs so placed as to prevent the car from being thrown from the track was not negligence as matter of law, such frogs having been put in to prevent cars going in the proper direction from being thrown from the track. White v. Railroad Co., 61 Wis. 536, 21 N. W. 524.

§ 30. [1] Employment of competent engineer to construct bridge is no

As a general proposition, however, one who has contracted with a fit and competent person, exercising an independent employment, to do work not in itself dangerous to others or unlawful, according to the contractor's own method, and without his being subject to control, except as to the results of his work, is not answerable for the wrongs of such contractor, his subcontractors or servants, committed in the prosecution of the work.[2] But this principle cannot be applied so as to relieve carriers from any of their duties to passengers. One of the very plainest duties imposed upon a railroad company carrying passengers for pay is that it shall keep its track in good and safe condition, free from obstructions endangering those passengers. For the public to yield or waive the performance of this duty would be to waive that which is of the highest importance to personal safety or life itself. The law is necessarily rigid as to this. Passengers are entitled, by the clearest principles, to look in this respect to the carrier who has engaged to carry them, and cannot be told to follow some one, a stranger to them, and often irresponsible. The company cannot devest itself of or shift this obligation.[3]

defense to an action by a passenger injured by the falling of the bridge. Grote v. Railway Co. (1848) 2 Exch. 251. Where a passenger is injured by the washing away of an embankment of a railroad because of insufficient drainage, the company will not be relieved from liability by the fact that the road was constructed under the supervision of a competent engineer, and that the drainage, at the point of the accident, was provided for in a manner directed and approved by him. Philadelphia & R. R. Co. v. Anderson, 94 Pa. St. 351.

[2] Carrico v. Railway Co., 39 W. Va. 86, 19 S. E. 571. And see 1 Jagg. Torts, 231.

[3] Carrico v. Railway Co., 39 W. Va. 86, 19 S. E. 571 (company held

§ 31. SAME—ACT OF GOD.

Railroad companies must so construct their roadbeds as to be capable of resisting all violence of weather which may be expected, though rarely, to occur in the climate where they are located;[1] but such companies are not bound to provide against such extraor-

liable for act of independent contractor in negligently piling rock so close to the track as to scrape against passenger car); Virginia Cent. R. Co. v. Sanger, 15 Grat. 230 (liable for act of independent contractor in piling stones so near track that one of them rolled under wheels of passing train, causing its derailment). Where a man causes a building to be erected for viewing a public exhibition, and admits persons on payment of money, the contract between him and the persons admitted is analogous to the contract between a carrier and his passengers; and there is implied in such a contract a warranty, not only of due care on the part of himself and his servants, but also of due care on the part of any independent contractor who may have been employed by him to construct the means of conveyance and of support. Francis v. Cockrell, L. R. 5 Q. B. 184, 501, 23 Law T. (N. S.) 466. Proprietors of structures intended for public use, such as fair associations, theaters, etc., are held only to the duty of exercising reasonable care in constructing or repairing them, keeping in view the uses to which they are to be devoted. But this degree of care is charged upon them as a personal duty to be discharged by them. The burden of seeing and knowing that the building has been constructed with reasonable skill and care and prudence is cast upon them, and they are held answerable for independent contractors employed by them, whose failure to use due or ordinary care is to be deemed a failure of the proprietors. Tucker v. Agricultural Board, 52 Ill. App. 316. The proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation; and if he neglects his duty in this respect, so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial. Currier v. Music Hall Ass'n, 135 Mass. 414. See, also, post, § 344.

§ 31. [1] Great Western Ry. Co. v. Braid, 1 Moore, P. C. (N. S.) 101.

dinary and unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and not reasonably to be anticipated by that degree of engineering skill and experience required in the prudent construction of such road. In such case the injury cannot be held to be attributable to any fault or negligence of the company; it results from inevitable accident—vis major—the act of God.[2] Thus a railroad company is not in fault in respect to the construction of a culvert over a brook, which has stood for more than 40 years, and which never in all that time had failed to discharge all the water flowing into it, but which was washed out by an unprecedented local cloud-burst of about two hours' duration, emptying volumes of water upon the track.[3] And where a railway embankment through a marshy country has withstood floods for five years, the company is not liable for the death of a passenger caused by the giving way of the embankment by reason of a flood resulting from a storm "such as had never before occurred." [4] Even

[2] Libby v. Railroad Co., 85 Me. 34, 42, 26 Atl. 943.

[3] Id.

[4] Withers v. Railway Co., 27 Law J. Exch. 417; s. c. at nisi prius, 1 Fost. & F. 165. A railroad company constructed its track in a skillful manner, with a culvert of sufficient capacity to carry off all ordinary surface water. The embankment was undermined by an extraordinarily heavy local rain, which had not injured the surface of the track. Held, that the company was not liable for injuries in a wreck caused by the giving way of the embankment, where another train had passed over the track two hours before the accident, and where the track had been examined by the sectionmen only an hour before the accident, and been found in an apparently good condition. International & G. N. R. Co. v. Halloren, 53 Tex. 46.

a statute requiring railroad companies to construct ditches and drains along the sides of their roadbeds does not require them to provide against floods which are extraordinary and unprecedented.[5] Neither is a railroad company liable for the vis major of extreme cold, by which a sound rail is broken, without any want of care and skill on its part in the selection, testing, laying, and use of such rail.[6]

Upon the other hand, the company must provide its track with sufficient drains to carry off the waters of a storm which, though of unusual violence, is of such a character as may reasonably have been anticipated.[7] So the prevalence of continuous rain and snow in the winter, for a considerable time, is not an unprecedented or unusual event in Texas, against the effects of which a railroad company cannot guard by proper care and skill.[8] And where the immediate cause of the washing away of a railroad embankment is the lack of proper drainage, the fact that a rain storm of unprecedented violence concurred in producing the accident will not relieve the company from liability.[9] Nor is a landslide in a railway cut, caused by an ordinary fall of rain, an act of God.[10]

[5] Elliot v. Railway Co., 76 Mo. 518.

[6] McPadden v. Railroad Co., 44 N. Y. 478, reversing 47 Barb. 247; Canadian Pac. Ry. Co. v. Chalifoux, 22 Can. Sup. Ct. 721. In the last-cited case, this was held to be the rule both at the common law and under the Civil Code of the Province of Quebec.

[7] Great Western Ry. Co. v. Braid, 1 Moore, P. C. (N. S.) 101, affirming 10 U. C. C. P. 137.

[8] Missouri Pac. Ry. Co. v. Mitchell, 72 Tex. 171, 10 S. W. 411; Missouri Pac. Ry. Co. v. Johnson, 72 Tex. 95, 10 S. W. 325.

[9] Philadelphia & R. R. Co. v. Anderson, 94 Pa. St. 351.

[10] Gleeson v. Railroad Co., 140 U. S. 435, 11 Sup. Ct. 859, reversing

§ 32. SAME—GUARDING AGAINST ACT OF GOD.

The carrier owes to his passenger the duty of exercising the highest degree of practical care to ascertain whether or not the track has been rendered unsafe by an act of God, and to avoid its effect. "Under circumstances of more than ordinary peril, as in the case of violent storms, the company should inspect its lines with more than ordinary promptitude, particularly those portions which are the most liable to injury by storm or flood. The greater the peril, the greater the vigilance demanded." [1] "The duty of the company is to employ the highest degree of practicable care to guard against accidents, and where its agents or officers have knowledge that a great storm or a great

5 Mackey (D. C.) 356. In this last case it was said: "Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths, and illnesses have been held to be 'acts of God'; but we know of no instance in which a rain of not unusual violence, and the probable result thereof in softening the superficial earth, have been so considered." To construct a railroad embankment of earth in a place which has indications of having at one time been a natural watercourse is negligence, rendering the company liable for the death of a passenger in a railroad disaster caused by the washing away of the embankment by a flood in a violent, but not unprecedented, storm. Kansas Pac. Ry. Co. v. Lundin, 3 Colo. 94; Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442.

§ 32. [1] Libby v. Railroad Co., 85 Me. 45, 26 Atl. 943. In this case it was held that where a section crew knew that a severe rain storm had occurred, and that an extensive watershed emptied into a culvert about two miles from where they then were, and that a passenger train was due shortly after the rain ceased, the jury might find that their remaining in shelter for an hour and a half was negligence which rendered the company liable for injuries to a passenger caused by a washout at the culvert.

flood has probably made its track or bridges unsafe, it must, where there is reasonable time and opportunity, take measures to protect its passengers from injury." [2] Though a locomotive engineer has no knowledge of the extraordinary violence of a rain storm which secretly undermined the track, and caused the derailment of his train, yet the fact that he observed that the water was within eight inches of the ties—over three feet higher than he had ever seen it before—is, of itself, notice to him that there had been an unusual and extraordinary storm in that vicinity; and, in the absence of information on the part of the engineer as to how long the water had been at that height, or as to whether it had been higher, it is his duty to exercise the utmost circumspection before attempting to go over the embankment, and the utmost care and skill in the management of his train in going over it.[3] But the dangerous condition of a railroad track from a heavy rain does not render it negligence for a railroad company to run a train over the track, unless the

[2] Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, and 9 N. E. 357.

[3] Ellet v. Railway Co., 76 Mo. 518. The only case holding a contrary principle is that of Gillespie v. Railway Co., 6 Mo. App. 554. This case holds that a carrier is bound only to the use of ordinary care to guard against an act of God. "So far as regards the perils for which the carrier is responsible, he is bound to the highest degree of practicable care, and liable for slight neglect. But where the material issue comes in of act of God, or vis major, we have the operation of a peril for which the carrier is not responsible; and this, as in a case where the point is as to the passenger's contributory negligence, raises the question whether the carrier, notwithstanding the operation of perils which he does not assume, could, by the exercise of ordinary care, have avoided the catastrophe."

company or its employés knew, or by proper care would have known, the condition.[4] Nor is an elevated railroad chargeable with negligence in failing to suspend the entire operation of its road at the beginning of a blizzard of unprecedented violence, where the weather forecast had been favorable, and it had stopped snowing for some hours before the blizzard began. Hence the failure to so stop operations does not render the company liable for a collision between a snow-bound train and another approaching from the rear.[5] Nor is a carrier operating a railroad over mountains negligent in running a train during a severe snowstorm, and it is not liable to a passenger injured by the train's derailment by a snowslide; such an accident having never before occurred at this point, and there having been no reason to anticipate one.[6]

[4] International & G. N. R. Co. v. Halloren, 53 Tex. 46. On a dark, rainy night, a passenger train running on a track laid along the mountain side was frequently stopped at exposed places. At length the rain ceased, and the train reached a portion of the road regarded as perfectly safe, the track on which was laid on an earth fill, supplied with a culvert which had been adequate to carry off the water for 35 years. Owing to a waterspout at this place, the embankment had been washed away, and a pond had formed which floated the ties and rails unbroken. The train was running so slowly that the rear cars did not get on the fill, but the locomotive and front passenger coaches plunged into the pond, and many passengers were killed and injured. Held, that the company was not liable, no negligence being shown. Norfolk & W. R. Co. v. Marshall's Adm'r, 90 Va. 836, 20 S. E. 823.

[5] Connelly v. Railroad Co., 142 N. Y. 377, 37 N. E. 462, reversing 68 Hun, 456, 23 N. Y. Supp. 88.

[6] Denver & R. G. R. Co. v. Pilgrim (Colo. App.) 47 Pac. 657.

§ 33. SAME—ACTS OF PUBLIC ENEMY.

A railroad company is not liable for defects in its roadbed caused by the act of the public enemy. Happily, there has not been very frequent occasion to apply this principle. At the outbreak of the Civil War, however, a railroad bridge over the Platte river was burned by armed rebels on a sudden and hostile incursion a few hours before the arrival of a passenger train, and the sectionmen were overawed and driven off, so that no notice of the burning of the bridge had come to the trainmen. It was held that the company was not chargeable with negligence in failing to maintain a proper roadbed. It was further held that the failure to stop the train before going on the bridge was not negligence which would render the company liable for injuries to a passenger caused by the train's plunging into the chasm, especially where there was danger of the train's being fired into and captured.[1] So, in a Georgia case, it was held that, though a car was derailed, and a passenger killed, by reason of defects in the roadbed, yet a verdict exonerating the company from negligence was warranted by evidence that the accident occurred during the Civil War, when the ports of the South were under rigid blockade, and supplies of iron were not to be had.[2]

§ 33. [1] Sawyer v. Railroad Co., 37 Mo. 241.

[2] Wright v. Banking Co., 34 Ga. 330.

§ 34. SAME—INSPECTION AND REPAIR.

A railroad company is not absolutely bound to know whether its tracks are in fit condition for safe passage, but it must do all that human care, foresight, and vigilance can do to ascertain their condition.[1] The duty of inspection does not end when the materials are put in place, but continues during their use; for the company is bound to test them from time to time, to ascertain whether they are being impaired by use or exposure to the elements.[2] It is not enough that a track is in "apparently" good condition. If there are defects rendering it unsafe, which by the exercise of care and skill might have been discovered, it is the carrier's duty to discover them, and thus avoid danger to its passengers.[3]

§ 34. [1] St. Louis C. R. Co. v. Moore, 14 Ill. App. 510.

[2] Louisville, N. A. & C. R. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284.

[3] Chicago, P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960. It is the duty of a railroad company to have a good, substantial, and safe roadbed for the use of its passenger trains, and default in that duty, where the defect is patent to common observation, is negligence. Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 South. 714. To permit rotten cross-ties to remain on a railroad track is negligence, which renders the company liable for injuries to a passenger caused by the giving way of the ties under the weight of the locomotive. Rutherford v. Railroad Co., 41 La. Ann. 793, 6 South. 644. It is evidence of negligence, in the conduct of the carrying, that the train was run over a rail known to have been defective and fractured. Pym v. Railway Co., 2 Fost. & F. 619. A railroad company is guilty of gross negligence in permitting the rails to become badly worn, having their ends so loose that they pass up and down with each passing car, such rails varying in length from 9 to 13 feet, some of them not meeting at the joints by 2½ inches, the spaces being filled in with wooden plugs, and

§ 35. SAME—OBSTRUCTIONS.

It is the duty of a railroad company to exercise proper care and diligence, not only to free the track itself from obstructions, but also to guard against the interference of objects near the track with passenger trains. Thus a railway company, as to its passengers, is bound to see that the cars which it uses on side tracks are secured in place, so that they will not come upon the track to overthrow any train that may come along.[1] And the fact that a freight car is mov-

some of the ties being broken in the middle. Toledo, W. & W. Ry. Co. v. Apperson, 49 Ill. 480. Repairing a railroad track by cutting out a portion of a broken rail, and inserting a sound piece, instead of substituting an entirely new rail, is negligence. Peoria, P. & J. R. Co. v. Reynolds, 88 Ill. 418. Repairs of a railroad track were attempted to be made without interfering with the passage of trains. The time for the passage of the different trains was well understood, and to insure safety it was only necessary that the employés of the company should have an accurate timepiece, to enable them so to conduct the work that the track should be in order on the arrival of the next train. Held, that it was the duty of the company to see to it that the men employed in labor of that kind were furnished with a proper timepiece, and that where the company paid no attention to that subject, but left the foreman to procure and to attend to the regulation of his own watch, it was a question for the jury whether or not the company was guilty of negligence. Matteson v. Railroad Co., 62 Barb. (N. Y.) 364.

§ 35. [1] Union Pac. Ry. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843. Failure to set brakes on freight cars on a side track is negligence, which renders the company liable for injuries to a passenger, whose train was struck by one of the freight cars which had moved down the side track so near the main track as to render a collision inevitable. Id. In Spicer v. Railway Co., 29 Wis. 580, it was held to be negligence for the engineer of a freight train to uncouple cars standing on a side track, on a down grade, without blocking the wheels, or disconnecting the switch from the main track; and the company was held liable for

ed by the force of the wind from a side track to the main track is not alone sufficient to relieve the carrier from a charge of negligence, in an action by a passenger injured in a collision with the car. It is the duty of the company to secure cars on a side track so that no wind which may reasonably be anticipated will move them. Defendant's evidence that the car was secured by setting the brakes is not sufficient to take the case from the jury, where plaintiff's evidence shows that, if the brakes had been properly set, such a wind as there was prior to the collision would not have moved the car.[2] So, it is negligence in a railroad company to allow coal bins so close to its track that passengers on an open excusion car cannot safely stand, while passing them, on the running board that stretches along the side of such a car, and that takes the place of the aisle in the ordinary passenger car.[3] So, also, a street-car company, using electricity as a motive power, is bound to foresee the possible danger to which passengers on the footboards of its cars may be exposed by a slight turn of the body sidewise, or by a slight inclination of it backward, in consequence

injuries to a passenger sustained in a collision between a passenger train and the freight cars, which had run onto the main track of their own momentum.

[2] Webster v. Railroad Co., 115 N. Y. 112, 21 N. E. 725; Id., 40 Hun (N. Y.) 161. But placing cars on a side track is not negligence which will render a railroad company liable for injuries to a passenger, whose train ran off the track at a switch, and into the cars standing on the side track. Grant v. Railroad Co., 108 N. C. 462, 13 S. E. 209.

[3] Dickinson v. Railway Co., 53 Mich. 43, 18 N. W. 553. Code Tenn. 1884, § 1307, requires every railroad company to cut down on its lands trees more than six inches in diameter which might reach the roadbed if they fell.

of the proximity of its track to its trolley poles; and a jury may find it negligent in placing such a pole within 24 inches of the rail, and within 10 or 12 inches of the footboard of a moving car.[4] But it is not negligence for a street-car company to continue to run its cars on its track after the erection, by another company, of elevated railroad pillars in the street near its track; and where, on account of such pillars, it has purchased open summer cars six inches narrower than the ordinary cars, it is not liable for an injury to a passenger who was struck by one of these pillars while walking along the running board at the side of the car.[5]

The same principle applies to overhead structures, so far, at least, as passengers are concerned. "Railway companies are under an obligation to all persons who have a right to be on top of their trains, in the

[4] Elliott v. Railway Co., 18 R. I. 707, 28 Atl. 338, and 31 Atl. 694. Where a street railroad, improving its tracks, places a temporary track so near the curb of the street as to place its passengers, in getting on and off the cars, and while upon them, in danger of being struck by a telegraph pole, it is a fair question for the jury whether the company is or is not guilty of negligence. North Chicago St. R. Co. v. Williams, 140 Ill. 275, 283, 29 N. E. 672, 40 Ill. App. 590. A street-railroad company, which places its track in close proximity to a derrick, must use all reasonable care to avoid exposing passengers to danger, and especially is this so in view of the fact that passengers are allowed to stand on the side steps of the car. Seymour v. Railway Co., 114 Mo. 266, 21 S. W. 739.

[5] Murphy v. Railroad Co. (Super. Ct. N. Y.) 26 N. Y. Supp. 783; Vroman v. Railroad Co., 7 Misc. Rep. 234, 745, 27 N. Y. Supp. 257, 1128. The mere piling of dirt or clay on or near a street-railway track, for use in ballasting the track, where it has been undermined by a washout, is not negligence on the part of the company. Noble v. Railway Co., 98 Mich. 249, 57 N. W. 126.

discharge of any duty, to so construct overhead bridges that they will not cause any peril that can easily, and without any great outlay, be avoided; and, if any dangerous overhanging structures are for any reason maintained, it is the company's duty, in the exercise of ordinary care, to give warning, either verbally or by suspended whiplashes, to persons thus exposed." [6] But it has been held that a railroad company is not under any obligation to construct its roadbed so as to render it safe for passengers to ride on top of a caboose, in violation of its rules, and one so riding assumes the risk of being struck by a projecting water spout from a water tank near the track.[7] So, when a railroad company has nothing to do with overhead structures erected by a municipal corporation in mak-

[6] So held in case of a stock drover, who was struck by a bridge while rightfully walking on top of a cattle train from the engine to the caboose. Chicago, M. & St. P. Ry. Co. v. Carpenter, 5 C. C. A. 551, 56 Fed. 451, and cases cited. It is a question of fact for the jury to determine whether or not a railroad company is negligent in constructing snowsheds over the track so low that a cattle drover, rightfully walking on top of a refrigerator car, and ignorant of the whereabouts of the shed, is struck on the head, and thrown from the car. Saunders v. Railroad Co. (Utah) 44 Pac. 932. A different rule has been laid down by some courts with respect to railroad employés. Baylor v. Railroad Co., 40 N. J. Law, 23; Baltimore & O. R. Co. v. Stricker, 51 Md. 47; Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. St. 276; Gibson v. Railway Co., 63 N. Y. 449. Where a building contractor negligently suspends the guy rope of a derrick too low for a street car to pass under it, and the driver of the car negligently drives against the rope, so as to cause the derrick to fall upon and kill a passenger on the car, both the contractor and the railway corporation may be held liable in an action by the widow of the passenger. Hunt v. Railroad Co., 14 Mo. App. 160.

[7] St. Louis S. W. Ry. Co. v. Rice, 9 Tex. Civ. App. 509, 29 S. W. 525.

ing a public improvement, it is not the duty of the railway directors to assume that such works will be negligently conducted by those who have contracted for their execution, and to take precautions against possible negligence on the part of persons who are not in their employment, nor under their control.[8]

The locomotive engineer and all other train hands are, of course, bound to exercise a high degree of care to avoid collisions with obstructions on or near the track. Thus an engineer of a passenger train is guilty of negligence in driving his train, in broad daylight, at the rate of 10 or 15 miles per hour, against sticks of wood lying directly across the track, visible for a distance of a quarter of a mile before reaching them, though he thinks that he can knock them out of the way.[9]

[8] Daniel v. Railway Co., L. R. 5 H. L. 45, affirming L. R. 3 C. P. 591, reversing Id. 216. In this case the facts were: The city of London was authorized by statute to execute certain works over the line of the Metropolitan Railway Company. These works consisted partly in placing heavy iron girders upon the walls running along the line of railway, but the railway company had no control over these works, and they were executed by contractors engaged by the city. Several girders had been safely put in place by manual labor, but on this occasion the contractor brought into use for one of the girders a monkey steam engine, which moved the girder with a jerk, and so caused it to overbalance and fall. It fell on a passing train, and injured a passenger therein. Held, that this was not a mischief, the occurrence of which the railway company was bound to anticipate, and against which it was bound to take precautions, and that therefore its failure to employ signalmen to warn the contractors of approaching trains, for the purpose of stopping work until they had passed, was not negligence; that duty being incumbent on the contractors.

[9] Willis v. Railroad Co., 34 N. Y. 670, affirming 32 Barb. 398. A railroad company is liable for any casualty, resulting in injury to a

But a statute requiring the alarm whistle to be sounded when any person, animal, or other obstruction appears on the track applies only to actions for injury to persons or property on the track, and not to the case of a passenger injured in a collision between the train and an inanimate obstruction on the track.[10] Where a wreck obstructs a track, and necessitates a transfer of passengers from one train to another in the nighttime, compelling them to walk 900 feet, and to cross a ditch over which planks have been placed, the failure to place a light at the crossing, or to give any warning of the ditch, or to take some means to guard passengers from the extra hazard to which they are exposed in crossing, warrants the jury in finding negligence, and in holding the company liable for injuries to a passenger who fell into the ditch in crossing.[11]

passenger, which may occur from running with greater speed than is prudent, or on account of collisions with obstructions on the track, which the engineer or conductor saw, or might have seen, or which he might have avoided by the most skillful and prompt use of all the means in his power. Nashville & C. R. Co. v. Messino, 1 Sneed (Tenn.) 220. The question of negligence in the management of a street car on approaching, at its usual rate of speed, a structure within an inch of the track, is for the jury. Dahlberg v. Railway Co., 32 Minn. 404, 21 N. W. 545.

[10] Louisville & N. R. Co. v. McKenna, 7 Lea (Tenn.) 313.

[11] Vicksburg & M. R. Co. v. Howe, 52 Miss. 202. The progress of a passenger train was interrupted by the wreck of a freight train, consisting principally of oil cars, the oil in which was burning. The passengers were transferred to the other side of the wreck, 200 feet from the burning cars, to await another train. Held that, since the burning cars were obvious, and the danger of explosion of oil apparent, the railroad company was not bound to restrain the passengers by physical force from approaching so near the burning cars as to become endangered by an explosion, should one occur. There was no pitfall or trap.

§ 36. SAME—CATTLE ON TRACK.

Though, as between the owner of live stock and a railroad company, the company is not bound to fence its track at common law, yet as to its passengers the company is bound to exercise the highest human care and skill to keep animals off its track; and where a passenger has been injured in a collision between his train and animals on the track, the failure to fence is sufficient evidence of negligence to take the case to the jury.[1] This principle is peculiarly applicable in states where it is the general custom to permit cattle to run at large. If a fence will render the track safe from intrusion of cattle, and no other precautions will suffice, the company's obligation to its passengers demands the more effective remedy.[2] The duty to fence their tracks is now very generally imposed on railroad companies by statute. Many decisions affirm that these statutes are valid, because they are enacted under the police power, and are intended to protect persons traveling on the railroads of the country. If

nor any invitation to passengers to leave the place designated by the company to await the arrival of the other train, and approach to within about 80 feet of the burning cars. Conroy v. Railway Co. (Wis.) 70 N. W. 486. A railroad company is guilty of negligence in requiring its passengers to walk over a bridge in the nighttime, without any guards on either side of it, and obstructed by a large piece of timber, and without any lights to guide them. Jamison v. Railroad Co., 55 Cal. 592.

§ 36. [1] Sullivan v. Railroad Co. (1858) 30 Pa. St. 234; Lackawanna & B. R. Co. v. Chenewith, 52 Pa. St. 382; Buxton v. Railway Co. (1868) L. R. 3 Q. B. 553.

[2] Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597, and cases cited.

the duty to fence is negligently violated, and the violation of duty is the proximate cause of injury to a passenger, his right of action is clear and complete.[3]

At intersections with public highways, it is the duty of the company towards its passengers either to construct cattle guards or station watchmen there.[4]

Employés in charge of trains must exercise faithful watchfulness to prevent accidents by collision with cattle, and the company must keep a clear right of way to afford them the facility of performing that duty.[5] It is negligence for the engineer of a passenger train to run at full speed over any part of the road known to be frequented by cattle, unless that part of the road is properly guarded from invasion.[6]

[3] Louisville, N. A. & C. Ry. Co. v. Hendricks, 128 Ind. 462, 28 N. E. 58.

[4] Brown v. Railroad Co., 34 N. Y. 404. Though a cow gets on a railroad track within the limits of a village, where the statute does not require the company to maintain a fence, yet the company is negligent in failing to maintain a sufficient cattle guard at the village limits; and a passenger who is injured by the derailment of the train caused by striking the cow may recover from the company. Atchison, T. & S. F. R. Co. v. Elder, 149 Ill. 173, 36 N. E. 565; Id., 50 Ill. App. 276.

[5] Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597.

[6] Brown v. Railroad Co., 34 N. Y. 404. Where cattle are habitually attracted to the tracks near a flag station by corn liable to be scattered on the ground, and cows have been run over at that station, a proper consideration for the safety of passengers very clearly imposes on the company the duty, either of checking the speed of a train intending to pass the station without stopping, so as to remove all danger of accidents, or of stationing a watchman there at the appproach and passage of such a train, for the purpose of keeping the track clear. If there is no watchman, it is inexcusable negligence to run a train past the station with more than ordinary velocity. Chicago, R. I. & P. R. Co. v. McAra, 52 Ill. 296. In an action by a passenger for injuries sustained in the derailment of his car in a collision with a bull in the

§ 37. SAME—STREET-CAR TRACKS.

The rules governing the construction and maintenance of the roadbeds of ordinary steam railroads are in the main applicable to street railways. Thus it is negligence in a street railway to construct its tracks so close together on a curve that cars going in opposite directions come into collision.[1] Likewise proper care must be exercised by the company to keep the track in

nighttime, the presumption of negligence is completely rebutted by uncontradicted evidence that, owing to a curve in the track, the engineer could not have seen the bull in time to have stopped the train, so as to have avoided the accident. Brunswick & A. R. Co. v. Gale, 56 Ga. 322. It would seem that the court overlooked the company's duty to keep the track clear.

§ 37. [1] Germantown P. Ry. Co. v. Brophy, 105 Pa. St. 38. Where a passenger standing on the running board of a crowded street car is struck by another car on a parallel track, the fact that the two tracks were closer together at the place of accident than at other portions of the line, and that by the sinking of one of the rails the cars at that point pitched towards each other, is sufficient to warrant a jury in finding negligence. Gray v. Railroad Co., 61 Hun, 212, 15 N. Y. Supp. 927. A street-railroad company constructed its parallel tracks so wide apart that people frequently stood between them while cars were passing each other, and open cars had been run on the road for 20 years, and thousands of passengers had stood on the running boards of such cars without injury from cars on the other track. Held, that the company was not chargeable with negligence in failing to have more space between the tracks, and that it was not liable for injuries to a passenger standing on the running board in such an extraordinary position as to be struck by a car on the parallel track. Craighead v. Railroad Co., 123 N. Y. 391, 25 N. E. 387, reversing (City Ct. Brook.) 5 N. Y. Supp. 431. But where a street-railway company constructs its parallel tracks so close together that cars passing on a curve almost touch each other, it is negligence on the part of the company to take no precautions to prevent cars from passing each other on the curve. Summers v. Railroad Co., 34 La. Ann. 139.

repair.[2] But a street railroad, by laying its tracks and running its cars across a bridge built by the state over a canal, and forming a continuation of the street, does not thereby make the bridge an appliance of its own, within the meaning of the rule which exacts extreme care and caution from carriers in relation to the condition of appliances employed by them. While it might be negligence to drive over a bridge manifestly unsafe, or not strong enough to bear the proposed weight, the company is not liable for injuries to a passenger caused by a latent defect in the bridge, even if discoverable in the process of manufacture.[3]

[2] In an action by a passenger thrown out of an open street car, it appeared that the company had removed paving stones from the street for the purpose of repairing its tracks, and there was evidence that the absence of paving stones made the passage at this point dangerous, and that this caused the accident. Held, that there was sufficient evidence of negligence to take the case to the jury. Valentine v. Railroad Co., 137 Mass. 28. While a street-railroad company has the right to remove snow from its tracks, it is bound to exercise reasonable care and diligence in so doing; and, if it negligently permits a ridge of ice and snow to accumulate for some weeks along its tracks, it is liable for injuries sustained by a passenger who slipped on this ridge, and fell under the wheels of a car he was about to board. Dixon v. Railroad Co., 100 N. Y. 170, 3 N. E. 65.

[3] Birmingham v. Railroad Co., 137 N. Y. 13, 32 N. E. 995, reversing 63 Hun, 635, 18 N. Y. Supp. 649, 59 Hun, 583, 14 N. Y. Supp. 13. The court said: "Where a steam railroad has a right to build a bridge, and, instead of building, leases the right to cross the bridge of another, the reason for holding that such bridge is thereby adopted its own by the company using it is obvious. It is a voluntary matter on the part of the company whether to build its own, or to lease the bridge of another; and, if it choose the latter mode of crossing the obstruction, it is but another way of obtaining a bridge of its own, and, when it thus contracts for its use, it, of course, adopts it as its own structure. The position of a street railway in attempting to carry on its business of

In conclusion, it should be stated that, while a municipal corporation, in the exercise of the police power, can prohibit such an adjustment of street-car tracks as will endanger the lives of passengers, the failure to exercise that power does not render the city liable to a passenger, who, while riding on the running board of an open car, was struck by a trolley pole near the track.[4]

§ 38. DUTY AS TO VEHICLES.

Common carriers of passengers must use the best mechanical appliances in their vehicles, and exercise the highest degree of practicable care and skill to determine that all their appliances are safe for purposes of transportation; but they are not insurers, and consequently are not liable for latent defects not discoverable by the exercise of proper care and skill.[1]

running cars through the public streets of a city has nothing in common with that occupied by a steam railroad under the circumstances mentioned." It was held that the street-railroad company was not liable for an injury to a passenger while crossing the bridge, caused by the breaking of a bridge attachment, which was defective when placed in position; the defect being discoverable by the maker in the process of manufacture, but not discoverable from any examination that could be made by any person using the bridge for crossing. But in Catalanotto v. Railroad Co. (City Ct. Brook.) 7 N. Y. Supp. 628, it was held negligence in a street-car driver to drive at a rapid rate of speed over a draw bridge spanning a canal, when he knew that the vacillation caused thereby was liable to dislodge a heavy weight suspended near the car track, and used in operating the draw.

[4] Kennedy v. City of Lansing, 99 Mich. 518, 58 N. W. 470.

§ 38. [1] Anthony v. Railroad Co., 27 Fed. 724; Nashville & C. R. Co. v. Messino, 1 Sneed, 220. And see, ante, §§ 1, 2.

In behalf of the proposition that carriers of passengers absolutely warrant the roadworthiness of their vehicles, many a gallant legal battle has been fought, but generally without avail. Aside from a few dicta in the earlier English cases,[2] and a decision of the New York court of appeals,[3] now overruled,[4] the courts have uniformly held that in these respects, as well as in all others, the carrier's liability depends on negligence.[5] In some of the states, however, by force of statute, a different rule prevails. The Civil Code of California provides: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purpose to which they are put, and is not excused for default in this respect by any degree of care." [6]

The carrier's duty with respect to vehicles has been

[2] Sharp v. Grey, 9 Bing. 457; Bremner v. Williams, 1 Car. & P. 414–416; Israel v. Clark, 4 Esp. 259.

[3] Alden v. Railroad Co., 26 N. Y. 102.

[4] Carroll v. Railroad Co., 58 N. Y. 158; McPadden v. Railroad Co., 44 N. Y. 478. In Readhead v. Railway Co., L. R. 4 Q. B. 379, 392, it was said, with reference to Alden v. Railroad Co.: "The English courts are desirous to treat the American decisions with great respect; but, as their authority here must mainly depend on the reasons on which they are founded, we have felt bound to examine the reasons on which this decision was based, with the result which has already been stated."

[5] See, ante, §§ 1, 2; Readhead v. Railway Co., L. R. 4 Q. B. 379; Carroll v. Railroad Co., 58 N. Y. 138; Meier v. Railroad Co., 64 Pa. St. 225. A railroad company is not liable for injuries to a passenger who tripped on the car step, where he himself admits that he looked at the car step, and saw nothing wrong, and numerous witnesses agree that it was not defective. Hitchcock v. Railroad Co., 50 Hun, 606, 3 N. Y. Supp. 218.

[6] Section 2101. Comp. Laws Dak. 1887, § 3839, and Code Mont. 1895, § 2791, are identical with this section.

enforced in many cases. A carrier, it is said, does not fulfill his duty to his passengers by providing appliances which are sound and complete when tested by those in use on his line, but he must see to it that they are of a safe kind.[7] And extraordinary diligence will require the carrier to use the appliances he has, though it might not require him to provide them.[8] In supplying grips and brakes, a cable railway company is bound to anticipate and take into consideration all such weather and conditions of the track as may be reasonably expected in the climate where operated.[9] A railroad company which is unable, from causes beyond its control, to provide a passenger coach according to its contract, and which substitutes a baggage car, is liable for injuries to a passenger caused by some defect in the car, unless it can show that it exercised the utmost care and diligence, and that the baggage car was a safe conveyance.[10] But it must be borne in

[7] Farish v. Reigle, 11 Grat. 697, 716.

[8] Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406. Although there may be no negligence whatever in the failure of an electric street-car company to have gates to the platforms of its cars, for the purpose of guarding against accidents to passengers by preventing them from leaving the cars on the wrong side, yet when a particular company has such gates to the platforms of its cars, the failure to keep them closed may or may not be negligence in the given instance, and this is a question of fact for the jury. Id.

[9] Sharp v. Railway Co., 114 Mo. 94, 20 S. W. 93.

[10] Baltimore & P. R. Co. v. Swann, 81 Md. 400, 32 Atl. 175. It is the duty of a railroad company, when placing ladders at the ends of cars, instead of on the outside, to provide such bumpers or agencies as will prevent cars that are coupled together from coming so close together as to imperil the life or limb of a person who may be lawfully employing such ladders,—such as a cattle drover inspecting his stock

mind that conveyances are constructed with reference to their careful and prudent use by passengers, and that construction cannot be said to be defective which is only unsafe in view of the careless conduct of a passenger in voluntarily jumping on or off a car in motion.[11] So there is no principle of law which requires a carrier to furnish its road with new cars to transport passengers, or which makes it liable for using old ones. Whether new or old, it is required to keep them in good repair, and fit for use, so as not to endanger the safety of passengers.[12] The fact that the sheathing of a wheel on a street car projects above the floor is not evidence of negligence against the company, where there is ample room to enter and leave the car; and a passenger who in broad daylight stumbles over such a projection, while rising to signal the

while the train is in motion. New York, C. & St. L. R. Co. v. Blumenthal, 57 Ill. App. 538, affirmed in 160 Ill. 40, 43 N. E. 809. In an action for injuries to a passenger riding in a caboose attached to cars loaded with logs, it appeared that the train was derailed owing to the fact that one of the logs rolled from its place onto the track. It also appeared that the load in question was seven feet high, while it was usual to load the logs only from four to six feet high, and that the top log was secured by a block, because of a crooked log underneath it. Held, that the question of negligence was for the jury. Keating v. Railroad Co., 104 Mich. 418, 62 N. W. 575. Whether failure to put guards in front of the wheels of a street car, as required by an ordinance, is negligence, and, if so, whether the absence thereof was the cause of an injury to one who, trying to get on the front platform while the car was moving, missed his footing, and got his foot under the wheel, while holding with both hands on the railings, are questions for the jury. Finkeldey v. Cable Co., 114 Cal. 28, 45 Pac. 996.

11 Werbowlsky v. Railroad Co., 86 Mich. 236, 48 N. W. 1097.

12 Wormsdorf v. Railroad Co., 75 Mich. 472, 42 N. W. 1000.

conductor to stop the car, cannot recover for the injuries sustained.[13]

§ 39. SAME—LATENT DEFECTS.

The law may now be regarded as settled, except where a statute exists to the contrary, that a common carrier of passengers is not liable for injuries to a passenger caused by a latent defect in the vehicle. The leading American case on the subject is that of Ingalls v. Bills,[1] and the leading English authority is Readhead v. Midland R. Co.[2] In the Massachusetts case, which was an action for injuries to a passenger in a stage coach, it was held that, "where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." [3] In the English case it was ruled that a passenger could not recover for injuries caused by the breaking of the tire of one of the car wheels owing to "a latent defect in the tire which was not attributable to any fault on

13 Farley v. Traction Co., 132 Pa. St. 58, 18 Atl. 1090, affirming 6 Pa. Co. Ct. R. 347. See, to same effect, Thompson v. Railway Co. (Mo. Sup.) 36 S. W. 625.

§ 39. 1 9 Metc. (Mass.) 1.

2 L. R. 4 Q. B. 379.

3 Ingalls v. Bills, 9 Metc. (Mass.) 1.

the part of the manufacturer, and could not be detected previously to the breaking." [4]

A "latent defect" has been defined by the New York court of appeals to be "such only as no reasonable degree of human skill and foresight could guard against." [5] It has been frequently held that a railroad company is not liable for injuries sustained in the derailment of a train caused by a defect in the axle of one of its cars, which could not have been discovered by the highest degree of care known to the best railroad experts.[6] So it has been held that a carrier of passengers is not liable for injuries caused by the bursting of a boiler owing solely to a latent defect not discoverable on examination, or by the application of any

[4] Readhead v. Railway Co., L. R. 4 Q. B. 379.

[5] Palmer v. Canal Co., 120 N. Y. 170, 24 N. E. 302, affirming 46 Hun, 486. A carrier of passengers is liable for injuries which happen by reason of defects in the carriage, which might have been discovered by the most careful and thorough examination, but not for an injury which happens in consequence of a hidden defect, which could not upon examination have been discovered. Hadley v. Cross, 34 Vt. 586. In the case of a latent defect in an appliance for the carriage of passengers, the question is not whether the carrier had actual notice of it sufficiently long before the accident to have corrected and repaired it; but is whether, by the exercise of that high degree of care required of carriers of passengers, it might have been discovered and remedied. West Chicago St. R. Co. v. Stephens, 66 Ill. App. 303.

[6] Texas & P. Ry. Co. v. Buckalew (Tex. Civ. App.) 34 S. W. 165; Hanley v. Railroad Co. (1846) 1 Edm. Sel. Cas. (N. Y.) 359. A railroad company is not liable for an injury to a passenger caused by the breaking of a car wheel, which was manufactured in a proper manner by reputable manufacturers, and, like the axle, without a blemish, and no defect was discoverable after the usual examination and test on the night of the accident. Frelsen v. Southern Pac. Co., 42 La. Ann. 673, 7 South. 800; Grand Rapids & I. R. Co. v. Boyd, 65 Ind. 526; Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80.

tests known or practicable.[7] Where a cable company makes a thorough examination of its cars every night, including grips and brakes, it is not liable for an accident caused by the breaking of the grip, owing to some latent, hidden defect, not apparent to the eye, and not discoverable by examination and tests.[8] Neither is a railroad company liable for mortification and discomforts endured by a female passenger while locked in the water-closet of a car owing to a defect in the lock, where it appears that the lock was of the best manufacture; that the defect was not discoverable before the accident; that as soon as plaintiff's predicament was discovered the train hands took steps to release her; and that, with her husband's assistance, she got out of the closet through a window.[9]

§ 40. SAME—LIABILITY FOR NEGLIGENCE OF MANUFACTURER.

Closely connected with the subject of latent defects is the question whether or not a carrier which purchases its appliances from reputable manufacturers is liable for defects therein which it could not have discovered by any test after the appliances came into its possession, but which could have been discovered by the manufacturers in the exercise of proper care. We

[7] Carroll v. Railroad Co., 58 N. Y. 126; Robinson v. Railroad Co., 9 Fed. 877; Illinois Cent. R. Co. v. Phillips, 55 Ill. 194.

[8] Carter v. Railway Co., 42 Fed. 37. A vessel is not liable for injuries to a passenger caused by a latent defect in a sail boom. The Nederland, 14 Fed. 63, affirming 7 Fed. 926.

[9] Gulf, C. & S. F. R. Co. v. Smith (Tex. Civ. App.) 30 S. W. 361.

have seen that a railroad company is chargeable with the negligence of independent contractors in the construction of its track,[1] and the weight of authority and of reason is in favor of its liability for the negligence of manufacturers. The leading case on the subject is Hegeman v. Western R. Corp.[2] which held that a railroad company is liable for an injury to a passenger caused by the breaking of an axle of a car wheel owing to a latent defect, which would not be discovered by the most vigilant external examination, but which could have been ascertained by a known test applied in the process of construction by the manufacturer. The court said: "It was said that carriers of passengers are not insurers. That is true. That they were not required to become smelters of iron, or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is that they shall furnish a sufficient car to secure the safety of their passengers by the exercise of the utmost care and skill in its preparation. They may construct it themselves, or avail themselves of the services of others; but in either case they engage that all that well-directed skill can do has been done for the accomplishment of this purpose. A good reputation upon the part of the builders is very well, in itself, but might not be accepted by the public or the law as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the par-

§ 40. [1] Ante, § 30. [2] 13 N. Y. 9.

ticular instance. If to this extent they are not responsible, there is no security for individuals or the public." This case has recently been reaffirmed by the New York court of appeals,[3] and a similar decision has been made in California.[4] On the other hand, it has been held by the supreme court of Michigan that a railway company is not responsible for the negligence of the manufacturers from whom it purchases its rolling stock, and who have a reputable standing as manufacturers, where, before accepting the stock, it makes the usual and practical inspection, without discovering latent defects. "There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars and engines; and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessaries as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable when they buy them. When they make such inspection, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is im-

[3] When a drawbar is made to be put into a car, the duty is to apply the known tests to ascertain whether it is in all respects fit for the purpose it is intended to serve; and if, in consequence of the failure to do so, the defect is not discovered, the railroad company is responsible for an injury to a passenger caused by the defect. Palmer v. Canal Co., 120 N. Y. 170, 24 N. E. 302, affirming 46 Hun, 486.

[4] Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266.

practicable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers." [5]

§ 41. SAME—INSPECTION.

A passenger is entitled to expect at the hands of a carrier all that skill and care and prudence can do to protect the public from defects in the appliances of transportation. In inspecting its vehicles, the carrier is bound to use all the care and skill possessed by practical men in that business, but it need not press into its service the microscopic eye of science, with its delicate instruments and measurements.[1] But since the safety of thousands, who daily travel on railroad cars, depends in a great measure on the strength and fitness of the appliances used for their transportation, the company is bound to apply all known certain and satisfactory tests within its reach, and will not be exonerated if it relies on a test clearly insufficient.[2] The fact that the company has adopted a system of inspection and examination is not necessarily conclusive in

[5] Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

§ 41. [1] Cockburn, C. J., in Stokes v. Railway Co., 2 Fost. & F. 691.

[2] Texas & P. Ry. Co. v. Hamilton, 66 Tex. 92, 17 S. W. 406. Testing a car wheel on the track by striking it with a hammer is not sufficient if an existing crack cannot be discovered thereby, and it appears that such crack can be discovered by testing it with a hammer while off the track.

its favor on the question of negligence. Whether or not the system and the manner of its execution are all that may be required of the carrier is a question for the jury.[3] And the fact that an examination has been made will not relieve the carrier, if the duty was negligently performed.[4] The question how often an inspection should be made is generally one of fact for the jury, though Best, C. J., said it was negligence in a coach proprietor not to examine his coach before each journey.[5] If anything happens during the jour-

[3] Palmer v. Canal Co., 120 N. Y. 170, 24 N. E. 302, affirming 46 Hun, 486. Failure to inspect a spindle of a drawbar for two years makes it a question for the jury whether the company exercised a proper degree of care, though the removal and examination of the spindle were not within the system of inspection adopted by the company.

[4] Keating v. Railroad Co. (Mich.) 62 N. W. 575.

[5] Bremner v. Williams, 1 Car. & P. 414. The driver of a stage coach, who makes no examination of the brakes beyond merely looking at them when he takes charge, is guilty of negligence in commencing the descent of a hill without assuring himself that the blocks are in, which he can do by simply applying his feet to the brake. And where, owing to the absence of blocks, rendering the brake useless, the stage runs into the horses, frightening them into running away, and overturning the coach, the proprietors are liable for injuries to a passenger. Farish v. Reigle, 11 Grat. 697, 721. A female passenger, in alighting from an open street car, caught her dress in a broken hook, used to fasten the side curtains of the car, and fell, breaking her arm. There was no evidence as to how or when the hook was broken, but defendant showed that no better way of fastening the curtains existed; that the springs in the hooks would sometimes break by use; that, at the end of each trip, the cars were inspected by persons assigned to that duty, and the curtains examined; and that, if a broken hook was discovered, it was replaced by a perfect one. Held, that no negligence on the part of defendant had been shown. Kelly v. Railway Co., 109 N. Y. 44, 15 N. E. 879, reversing 39 Hun, 486. When a car wheel was new, and before it was used, it was properly and regularly tested by hammering it all around

ney which will charge the employés, as reasonable men, with notice that something about the vehicle is defective, it is their duty to make the inspection, and they are not relieved from this duty by the fact that an inspection had been made shortly before.[6] But to determine whether the conductor of a passenger train has been guilty of negligence in this respect, the test is not whether he omitted doing something that he could have done, which, if done, would have prevented the injury, but whether he abstained from doing anything which, in the exercise of extraordinary care and prudence, he consciously ought to have done, and did not do, the omission of which caused the accident pro-

and over; and, although this was a test not absolutely fixed and certain to discover defects, it was the best known and usual course pursued. No defect was then discovered. The wheel was afterwards much used, and thereby reduced in thickness, and considerably worn. The tire was then re-turned. Held, that the jury was warranted in finding defendant guilty of negligence in not again testing the wheel at this time, where there was evidence that an original defect in its construction could then have been discovered. Manser v. Railway Co., 3 Law T. (N. S.) 585.

6 Texas & St. L. Ry. Co. v. Suggs, 62 Tex. 323. A street-car driver who neglects to examine the car door which he knows has been injured by a drunken man in his effort to get in, and to warn another passenger of the danger, is guilty of negligence which will render the company liable for injuries to the passenger caused by the falling of broken glass from the door. Allen v. Railroad Co. (City Ct.) 2 N. Y. Supp. 738. Where a railroad company, on receiving a foreign truck, discovers a defect on making the usual general inspection, repairs it, and sends it on to destination, the fact that by a minute examination the company could have discovered another defect, entirely disconnected with the one previously discovered, does not render it liable to a passenger, who was injured in a collision caused by the breaking of the truck by reason of the undiscovered defect. Richardson v. Railway Co., 1 C. P. Div. 342.

ducing the injury.[7] Where a street car gets out of repair during the trip, the servants of the company can be justified in continuing the car in service until the power house is reached, only by giving passengers full notice of the condition of the car, and affording them an opportunity to decide, after full knowledge, whether they will continue as passengers.[8]

§ 42. SAME—GUARDING CAR WINDOW.

A railroad company is not bound to screen its car windows either to prevent passengers from negligently exposing their arms, nor to guard against stones or other missiles that may be thrown from the outside by persons over whom the company has no control.[1] A different ruling was once made by the supreme court of Pennsylvania,[2] but the case has been overruled.[3]

[7] Frelsen v. Southern Pac. Co., 42 La. Ann. 673, 7 South. 800. In this case a conductor was told by a passenger that he had heard an unusually loud noise, and had felt a jolt which had made the coach jump, and aroused him. The conductor, after reasonable inspection, inside and outside the car, did not become conscious of any occasion for alarm and danger. Held, that the conductor was not bound to stop the train for inspection, and that the company was not liable for an injury to a passenger in a derailment of the coach caused by the breaking of a wheel under the car in front, which could have been discovered had the train been stopped, and an inspection made.

[8] Washington v. Railway Co., 13 Wash. 9, 42 Pac. 528.

§ 42. [1] Missimer v. Railroad Co., 17 Phila. 172. "The carrier is no more bound to barricade the windows, to prevent passengers from extending their limbs outside, than he is to lock the doors to prevent them from going from car to car, and thus voluntarily subjecting themselves to the dangers obviously incident to that act of rashness." Indianapolis & C. R. Co. v. Rutherford, 29 Ind. 82.

[2] New Jersey R. Co. v. Kennard, 21 Pa. St. 203.

[3] Pittsburg & C. R. Co. v. McClurg, 56 Pa. St. 294.

Indeed, in view of the awful holocausts that have sometimes happened in railroad wrecks, a statute of New Jersey makes it unlawful for railroads to use passenger cars with screens, bars, or gratings across the windows.[4] In a recent federal case, however, it was left to the jury to determine whether reasonable diligence requires a street-railroad company to place guards in front of the street-car windows to prevent passengers from exposing their hands and arms, or to prevent their being jolted out of the window by the motion of the car.[5]

§ 43 SAME—CAR PLATFORMS.

It is negligence in a railroad company to permit a bolt or any other object to project above the surface of the car platform in such a manner that passengers leaving the car are liable to be tripped and thrown thereby.[1] So a brake wheel on a passenger car which is liable to suddenly revolve on application of the air brakes, unless the ratchet wheel is held by the dog, should be securely fastened, and failure to do so, resulting in injury to a passenger, who places his hand on the wheel as he is about to leave the car, is negligence.[2] Where a passenger is injured by the break-

4 Supp. Rev. p. 844, § 80.

5 New Orleans & C. R. Co. v. Schneider, 8 C. C. A. 571, 60 Fed. 210.

§ 43. 1 Chartrand v. Railway Co., 57 Mo. App. 425; Chicago & A. R. Co. v. Gates, 61 Ill. App. 211; Chase v. Railway Co., 60 Hun, 582, 15 N. Y. Supp. 35, affirmed 133 N. Y. 619, 30 N. E. 1150.

2 Cleveland, C., C. & St. L. Ry. Co. v. McHenry, 47 Ill. App. 301. Whether it is negligence not to have a chain stretched between the railings of the platform of a passenger coach in a mixed train, to prevent passengers from falling in case of any sudden or unexpected

ing of a street-car platform, and it appears that the car had been used for more than 12 years, it is proper to submit to the jury the question whether the platform was safe, and whether defendant knew, or could by the exercise of reasonable care have known, that it was unsafe.[3] But no legal duty is imposed on a railroad company to remove ice from the railing or platform of the front end of the express car, or to make such platform safe for passengers to get on or ride on, since it is not designed for the use of passengers.[4] So it has recently been held that a railroad company running a vestibule train is not required to place a mat on the car platform, to prevent passengers from stepping into an opening between the cars while the train is rounding a curve.[5]

Whether or not it is negligence not to inclose the front platform of a crowded street car with guards or fenders, to prevent passengers from being thrown therefrom, is a question for the jury.[6] But in the case

movement of the train while passengers are about to alight, is one of fact for the jury. Newton v. Railroad Co., 80 Hun. 491, 30 N. Y. Supp. 488.

[3] Norris v. Railroad Co., 4 Misc. Rep. 294, 24 N. Y. Supp. 140, affirmed 143 N. Y. 666, 39 N. E. 21. But a street-car company is not liable for the fracture of one of the slats composing its platform, under the pressure of the crutch of a passenger weighing 280 pounds, where the wood was entirely sound and undecayed, and the platform was constructed in the same manner as all street-car platforms are constructed. Crogan v. Railroad Co., 18 Alb. Law J. 70.

[4] Ohio & M. Ry. Co. v. Allender, 59 Ill. App. 620.

[5] Louisville, N. A. & C. Ry. Co. v. Stout, 66 Ill. App. 298.

[6] Archer v. Railway Co., 87 Mich. 101, 49 N. W. 488; West Philadelphia P. Ry. Co. v. Gallagher, 108 Pa. St. 521; Matz v. Railway Co., 52 Minn. 159, 53 N. W. 1071 (rear platform).

of a surburban line, doing a light business, it is not even evidence of negligence. "It must be run cheaply or not at all. Hence its cars were drawn only by single horses, and supervised by single persons; and, as they were used without turntables, their platform must, of necessity, be open." [7]

§ 44. SAME—MOTIVE POWER FOR STREET CARS.

It is the duty of a street-railway company to exercise reasonable care in selecting horses for use on its cars, and to take reasonable steps to ascertain whether they are safe for such use; and the company is chargeable with whatever knowledge a driver may have acquired or discovered, in the course of his employment, with respect to the character or disposition of the horses driven by him.[1] Where electricity is the motive power, knowledge must be imputed to the company that, if the electricity escapes from a defective machine in the car, the iron handles of the platform are liable to be charged therewith, and to give a shock to any one passing from one car to the other.[2]

§ 45. SAME—STATUTORY REQUIREMENTS.

Statutes in Ohio and Connecticut require the platforms of passenger coaches to be guarded with flexible or movable bridges or aprons.[1] A statute of Tennes-

[7] Hestonville P. Ry. Co. v. Connell, 88 Pa. St. 520.

§ 44. [1] Noble v. Railway Co., 98 Mich. 249, 57 N. W. 126.

[2] Burt v. Railway Co., 83 Wis. 229, 53 N. W. 447.

§ 45. [1] Gen. St. Conn. 1888, § 3540; Rev. St. Ohio 1890, § 3347.

see requires railroad companies to provide a bell rope for each and every passenger train on their respective roads,[2] and statutes in several states require passenger trains to be equipped with automatic air brakes.[3]

[2] Code Tenn. 1884, § 1306.

[3] Gen. St. Ky. 1894, § 778; 1 How. Ann. St. Mich. § 3363; Laws N. Y. 1884, c. 439, § 6; Pub. St. R. I. 1882, c. 158, p. 407, § 12; St. Vt. 1894, § 3910.

CHAPTER III.

DUTY OF CARE IN CONSTRUCTION AND MAINTENANCE OF STATIONAL FACILITIES.

§ 46. Extent of Duty.
47. Degree of Care.
48. Defects in Station Buildings.
49. Station Platforms.
50. Same—Adjustment Between Platform and Trains.
51. Approaches.
52. Ownership by Third Persons.
53. Snow and Ice.
54. Lights.

§ 46. EXTENT OF DUTY.

For the safety of its passengers, a railway company is bound to exercise care, not only as to the construction and maintenance of its station buildings, but as to all portions of its platforms and approaches thereto to which the public do or would naturally resort, and all portions of the station grounds reasonably near the platform, where passengers or those who have purchased tickets with a view to take passage on its cars would naturally or ordinarily be liable to go.[1]

It is a general principle of the common law that one who invites another to come on his premises undertakes with regard to that person a duty to exercise

§ 46. [1] Dillon, C. J., In McDonald v. Railway Co., 26 Iowa, 124, 145. See, also, Texas & St. L. Ry. Co. v. Orr, 46 Ark. 182.

care that the premises on which he invites the person to come, the approach to the premises, as well as the exit, shall be in such a state as not to expose the person using them, in consequence of the invitation, to undue or unreasonable danger. This principle lies at the foundation of the carrier's duty to any passenger who comes on his premises.[2] Wherever passengers are accustomed to be received upon a train, whether at the station house, at the water tank, or elsewhere, railroad companies are bound to keep in safe condition for transit the ordinary space in which passengers go to and from the trains, and the latter have the right to assume that the ground adjacent to the cars, within the limits in which persons naturally and necessarily go to and from them, admits of their getting safely out and in, even on a dark night.[3]

But this duty does not extend to places where pas-

[2] Parnaby v. Canal Co., 11 Adol. & E. 223; Gallin v. Railway Co., L. R. 10 Q. B. 212; Bennett v. Railroad Co., 102 U. S. 577. The law requires of railroad companies that they provide reasonably safe landings for their passengers, as also like means of access to and egress from their stations and premises. They must have due regard for the safety of passengers, as well in the location, construction, and arrangement of their station buildings and platforms, as in their previous transportation. Stafford v. Railroad Co., 22 Mo. App. 333. See, also, Toledo, W. & W. Ry. Co. v. Grush, 67 Ill. 262.

[3] Hulbert v. Railroad Co., 40 N. Y. 145. A railroad company which has been in the habit of stopping its trains at a street crossing, and receiving and discharging passengers there, and which has failed to indicate, by platform or otherwise, the bounds within which it will be safe for passengers to stand while awaiting the arrival of the train, momentarily expected, cannot complain if a person intending to take passage stations himself at any point adjoining the usual stopping place, where it might reasonably be expected that any part of the train adapted to the accommodation of passengers would

sengers cannot be reasonably expected.[4] The duty arises only where by contract or usage the carrier is required to be in readiness to receive his passengers.[5] Nor is a railroad company running a construction train over an unfinished road under any obligation to a passenger to have a safe and suitable platform at the end of its line, where there has not been sufficient time to furnish the facilities, and the passenger knows the facts.[6]

§ 47. DEGREE OF CARE.

By the weight of authority, only ordinary care is required of the carrier in the construction and maintenance of stational facilities, though in many of the states the highest degree of care is also exacted of the carrier in this respect.

The diversity of judicial opinion as to the degree of care required of a common carrier for the safety of his passengers at the station finds a marked illustration in a recent case decided by the supreme court of South Carolina.[1] That court is composed of three justices, and each one of them took a different view as to this fundamental question. Justice McGowan was of opinion that the general rule requiring a carrier of passengers to exercise the highest practicable degree of care applied here as elsewhere. Chief Justice Mc-

come to a stand. Lake Shore & M. S. Ry. Co. v. Ward, 35 Ill. App. 423.

[4] Murch v. Railroad Corp., 29 N. H. 9.

[5] The Anglo Norman, 4 Sawy. 185, Fed. Cas. No. 393.

[6] Chicago, K. & W. Ry. Co. v. Frazer, 55 Kan. 582, 40 Pac. 923.

§ 47. [1] Johns v. Railroad Co. (1892) 39 S. C. 162, 17 S. E. 698.

Iver said that this rule was adopted only because of the great danger to human life during the process of transportation, that the reason of the rule ceased when the actual transportation ceased, and that therefore the carrier is bound only to ordinary care at stations. Justice Pope succeeded in finding a middle ground, and held that, as a general rule, the company need exercise only ordinary care at stations, but that when it used appliances of exceptional danger, such as a trestle 10 feet high, over which it invited passengers to cross to reach its cars, the rule of extraordinary care applied.

The decided weight of authority, however, seems to be in favor of the proposition that the carrier is bound to exercise only ordinary care for the safety of passengers, so far as the construction and maintenance of the station buildings, platforms, and approaches are concerned. The New York courts are fully committed to this rule. In Kelly v. Manhattan Ry Co.,[2] Mr.

[2] 112 N. Y. 443, 20 N. E. 383. In this case it was held that an elevated railroad company which has furnished a covered stairway with hand rails, and placed pieces of rubber on each step to prevent slipping, is not guilty of negligence in failing to throw ashes or sawdust on the steps within an hour and a half after the ceasing of a storm of snow and sleet, which continued to rage until 4 o'clock in the morning, and that it was not liable for the death of a passenger who fell from the stairway at about 5:30 a. m. In Palmer v. Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859, it was held that a railroad company is not bound to the highest degree of diligence in removing from its car steps and platforms ice and snow which has accumulated while the train was in transit. The degree of care and diligence required of railroad companies in this respect is somewhat analogous to that imposed on municipal corporations in respect to the removal of snow and ice from the public streets. The same

Justice Peckham uses this language: "The rule in relation to the liability of railroad corporations for injuries sustained by defects in the approaches to their cars differs from that which obtains in the case of an injury to a passenger while he is being carried over the road of the corporation, and where the injury occurs from a defect in the roadbed or machinery or construction of the cars, or where it results from a defect in any of the appliances, such as would be likely to occasion great danger and loss of life to those traveling

principle is announced in Laflin v. Railroad Co., 106 N. Y. 136, 12 N. E. 599. In that case a passenger in alighting fell between the car and the station platform, and she alleged that the space between the car and the platform (about two feet) was too great. It was held, as matter of law, that defendant was not liable, in view of the fact that the platform had been used for many years, and that no one else had ever suffered any injury or inconvenience on account of the distance between the platform and the cars. In Buck v. Railway Co., 32 N. Y. St. Rep. 51, 10 N. Y. Supp. 107, affirmed in 134 N. Y. 589, 31 N. E. 628, it is held that the rule requiring the highest degree of care does not apply to injuries at stations caused by other passengers running into or crowding a passenger about to alight, and in such a case the carrier is bound to exercise only reasonable care to guard against injuries. In Bateman v. Railway Co., 47 Hun, 429, it is said: "As to a sidewalk maintained on its land by a railroad company for the use of passengers in going between the depot and a public street, the measure of care due from the company to its passengers, whom it invites to use it, is the same that is required of a municipal corporation with respect to its public sidewalks, which it is required by law to maintain." See, also, O'Reilly v. Railroad Co., 15 App. Div. 79, 44 N. Y. Supp. 264. In Bruswitz v. Navigation Co., 64 Hun, 262, 19 N. Y. Supp. 75, it is held that the rule requiring the highest degree of care does not apply in an action for injuries to a passenger on a vessel caused by stumbling over sockets projecting above the floor, and used to secure the tables in the dining saloon. As to such matters not connected with the operating machinery, the carrier is bound only to the exercise of ordinary care and skill.

on the road. The law in the latter case requires from the carrier of passengers the exercise of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such a case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance. As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents. But in the approaches to the cars, such as platforms, halls, stairways, and the like, a less degree of care is required, and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to are naturally of a much less serious nature. The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended."

Similar decisions have been made in California,[3] in Illinois,[4] in Iowa,[5] in Missouri,[6] in Oregon,[7] in Wisconsin,[8] and by the federal circuit court of Ohio,[9] and such is believed to be the English rule.[10]

[3] Falls v. Railway Co., 97 Cal. 114, 31 Pac. 901.

[4] Illinois Cent. R. Co. v. Hobbs, 58 Ill. App. 130; Wabash, St. L. & P. Ry. Co. v. Wolff, 13 Ill. App. 437.

[5] A railroad company is only required to use ordinary and reasonable care in lighting its station platform. Hiatt v. Railroad Co. (Iowa) 64 N. W. 766.

[6] Gunderman v. Railway Co., 58 Mo. App. 370.

[7] Skottowe v. Railroad Co., 22 Or. 430, 30 Pac. 222.

[8] A railroad company is held to the highest degree of care in re-

[9] See note 9 on following page.

[10] See note 10 on following page.

On the other hand, the highest practicable degree of care has been exacted of carriers, even as to their stational facilities, by the courts of last resort in Michigan,[11] Texas,[12] and Kentucky.[13]

The supreme judicial court of Massachusetts, which is very rarely under the necessity of reconsidering its opinions, has wavered on this question, but its latest utterance is in favor of the highest degree of care. "This rule [requiring the highest care] is held not only in our own state and in England, but all over the United States. It applies not only to carriers who use steam railroads, but to those who use horse railroads, stage coaches, steamboats, and sailing vessels. It ap-

spect to the condition and management of its engines and cars, for negligence in that respect involves extreme peril to passengers, against which they cannot protect themselves. As to the safety of stations, temporary or permanent, the railroad company is bound to the exercise of only ordinary care and prudence, in view of the situation and existing circumstances. Conroy v. Railway Co. (Wis.) 70 N. W. 486.

[9] Taylor v. Pennsylvania Co., 50 Fed. 755.

[10] Parnaby v. Canal Co., 11 Adol. & E. 223, cited with approval in Gallin v. Railway Co., L. R. 10 Q. B. 212.

[11] Cole v. Railway Co., 81 Mich. 156, 45 N. W. 983, following Cross v. Railway Co., 69 Mich. 363, 37 N. W. 361. An early Michigan case apparently holds to the contrary. Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

[12] Gulf, C. & S. F. R. Co. v. Butcher, 83 Tex. 309, 316, 18 S. W. 583. A carrier is required to exercise the highest degree of care in furnishing appliances at destination to enable passengers to alight in safety. Ft. Worth & D. C. Ry. Co. v. Kennedy (Tex. Civ. App.) 35 S. W. 335.

[13] Louisville Ry. Co. v. Park, 96 Ky. 580, 29 S. W. 455. A street railroad is bound to exercise the highest degree of care to get the steps of its street cars in a safe condition for alighting, and is bound to exercise more than ordinary care in this respect.

plies at all times when, and to all places where, the parties are in the relation to each other of passenger and carrier, and it includes attention to all matters which pertain to the business of carrying the passenger." "Difficulty in the application of the principle has sometimes come from an improper interpretation of the expressions 'utmost care and diligence,' 'most exact care,' and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all other matters which ought to be considered in conducting the business. Among these are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. With this interpretation of the rule, the application of it is easy. As applied to every detail, the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular it is the highest which can be exercised in that particular, with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars." [14]

[14] Dodge v. Steamboat Co., 148 Mass. 219, 19 N. E. 373. In this case it was held that a steamboat company owes to a passenger as high a degree of care after he has left the steamer, and is out upon the slip, as it does while he remains on board the vessel. In Moreland v. Railroad, 141 Mass. 31, 6 N. E. 225, the same court said: "The degree of care is not fixed solely by the relation of carrier and passenger; it is measured by the consequences which may follow the want of care. A railroad company is held to the highest degree of care in respect to the condition and management of its en-

The supreme court of Indiana seems to be on both sides of this question,[15] while the supreme court of Georgia holds that a railroad company is bound to extraordinary diligence as to duties directly involving the passenger's safety at the station, but in those involving his comfort and convenience only to ordinary diligence.[16]

§ 48. DEFECTS IN STATION BUILDINGS.

An examination of the decided cases shows that, so far as the construction and maintenance of station buildings is concerned, the courts certainly have made no very stringent application of the rule requiring the highest degree of care. Where a passenger entering a station suddenly and rudely pushes a swinging door in the face of a passenger about to leave, the company cannot be convicted of negligence because the door is not of glass above the middle rail, so that persons approaching the door can see each other. Neither is the presence of a small screw eye on the inner surface of

gines and cars, because negligence in that respect involves extreme peril to passengers, against which they cannot protect themselves. It would not act reasonably if it did not exercise greater care in equipping and running its trains than in regard to the condition of its station grounds." This was an action for personal injuries sustained by a passenger in stepping on some loose shingles in the station grounds while on his way from the train to the highway, and it was held error to charge that plaintiff is entitled to all the care which human foresight can furnish.

[15] Compare Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874, and Louisville, N. A. & C. Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968.

[16] Central R. & B. Co. v. Perry, 58 Ga. 461.

the door, where it can come in contact with a person's head, evidence of negligence.[1] The fact that a stairway at a railroad station is constructed with a strip of brass at the edge of each step, that these brass strips have become worn and slippery from constant use, and that there is no hand rail to the stairway, is not sufficient evidence of negligence to go to the jury in an action by a passenger, who slipped on the stairway, where it appears that brass strips are the ones generally in use on stairways, though a builder testifies that leaden strips would have been safer than the brass ones, because less slippery.[2]

But in a recent case the absence of a hand rail on a stairway at a station was held negligence, rendering

§ 48. [1] Graeff v. Railroad Co., 161 Pa. St. 230, 28 Atl. 1107. An illiterate person, while waiting at a station to take a train, inquired of a stranger on the platform where he could find a urinary. He was directed to go to the right, did so, and found two doors, upon one of which was printed the words, "For gentlemen," and upon the other the words, "Lamp room." Being in a hurry, and unable to read, he opened the wrong door, and fell down some steps, sustaining serious injuries. Held, in the absence of evidence as to the character of the steps down which plaintiff fell, or as to the state in which the door of the lamp room was ordinarily kept, that the judge was justified in nonsuiting plaintiff, on the ground that there was no evidence of negligence on the part of the company. Toomey v. Railway Co., 3 C. B. (N. S.) 146.

[2] Crafter v. Railway Co., L. R. 1 C. P. 300. It was said: "The line must be drawn in these cases between suggestions of possible precautions and evidence of actual negligence such as ought reasonably and properly to be left to the jury." In Foley v. Railway Co., 89 Hun, 606, 34 N. Y. Supp. 1050, it was held that an elevated railway company is not liable for injuries caused by the defective condition of the rubber covering its stairs, where the defect did not exist long enough before the accident to charge the company with knowledge of its existence.

the company liable for the death of one who resorted to the station to buy a ticket, and who was killed by falling from the stairway.[3] So the existence of a hole in the floor of a toilet room at a station is evidence of negligence in an action by a passenger who had occasion to use the toilet room while waiting for a train.[4] And any obstruction on a railroad station, placed or permitted to exist there, which renders the approach to the station dangerous, is negligence. Hence to permit a stairway at a station, used by all passengers, to be obstructed by an employé in such a manner that a passenger stumbles over the obstruction, will warrant a jury in finding negligence.[5] It has also been held that the failure to rebuild a depot for more than five months after its destruction by fire, thus compelling passengers to board trains as best they can, without any stational facilities, warrants the jury in finding the company negligent, and in holding it liable in damages to a female passenger who was injured while attempting to board a train, the lowest car step of which was over 30 inches from the ground.[6]

[3] Gilmore v. Railroad Co., 154 Pa. St. 375, 25 Atl. 774.

[4] Jordan v. Railroad Co., 165 Mass. 346, 43 N. E. 111. So a railroad company is guilty of negligence in leaving a hole in the floor of the depot, where its passengers are accustomed to alight from its cars, thus rendering the landing unsafe. Liscomb v. Transportation Co., 6 Lans. (N. Y.) 75.

[5] Lycett v. Railway Co., 12 App. Div. 326, 42 N. Y. Supp. 431. The fact that a railroad company does not keep its central entrance for passengers to its station free from the violent acts of its own servants, dangerous to persons entering for legitimate purposes, warrants a finding of negligent management. Gray v. Railroad (Mass.) 46 N. E. 397.

[6] Eichorn v. Railway Co., 130 Mo. 575, 32 S. W. 993.

§ 49. STATION PLATFORMS.

A carrier of passengers owes to a passenger approaching or leaving its trains the duty of keeping its station platform in a reasonably safe condition for convenient use; and a passenger, when leaving or approaching a train, has a right to assume, in the absence of information to the contrary, that the platform is in such reasonably safe condition.[1] But a railroad company fulfills its duty when it furnishes a platform that can be used without danger by a passenger exercising ordinary care. It is not bound, for example, to furnish a platform from which passengers can safely board its trains while in motion.[2] Nor is it liable to a passenger who, failing to use ordinary care, does not observe a descent of nine inches from one portion of the platform to the other, and who falls by reason thereof.[3]

Care must, of course, be exercised to keep the platform itself free from defects. Thus it has been held negligence per se to permit a hole eight inches wide and six feet long to remain for four days, after knowledge

§ 49. [1] Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587; Pennsylvania Co. v. Marion, 123 Ind. 415, 23 N. E. 973.

[2] Chicago & N. W. R. Co. v. Scates, 90 Ill. 586.

[3] Graham v. Railroad Co., 139 Pa. St. 149, 21 Atl. 151. A railroad company is not liable to a passenger who, on his way to a train in broad daylight, and while crossing an intervening track, strikes his toe against a rail, and falls to the ground, where the track and the rail are plainly to be seen, by any one who looks where he walks, and are constructed in the usual manner. Potter v. Railroad Co., 92 N. C. 541.

of its condition by the station agent, in the floor of a platform commonly used by passengers.[4] But the mere existence of a hole, barely large enough to admit the heel of a man's shoe, is not negligence as matter of law; the question is one of fact for the jury.[5] Nor is the arrangement of the platform in such a manner as to make it possible for horses to come upon it evidence of negligence; and hence a railroad company is not liable for injury to a passenger while on its station platform, who was struck by a runaway horse, not in defendant's care or use, and not led to run away by anything done by defendant.[6]

If the platform is elevated above the adjacent ground, the duty exists of constructing guard rails for the safety of passengers who may be on the platform in the nighttime. Thus the failure to erect a guard rail along the sides of the platform of an elevated railroad platform justifies the jury in finding negligence, which will render the company liable to a passenger who fell from the platform to the ground, 31 feet below, while searching for a urinal in the nighttime.[7]

Obstructions on the platform which are not in the

[4] Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587.

[5] James v. Railway Co., 107 Mo. 480, 18 S. W. 31. The fact that one of the planks is a few inches shorter than the other is not evidence of negligence which will render the company liable to a passenger, who in broad daylight stepped into a hole caused by the short plank. Stokes v. Railroad Co., 107 N. C. 178, 11 S. E. 991.

[6] Brooks v. Railroad Co. (Mass.) 46 N. E. 566.

[7] Jarvis v. Railroad Co. (City Ct. N. Y.) 16 N. Y. Supp. 96, affirmed in 133 N. Y. 623, 30 N. E. 1150. The same ruling was made with reference to a platform about three feet above the ground, in Missouri Pac. Ry. Co. v. Neiswanger, 41 Kan. 621, 21 Pac. 582.

nature of concealed traps or pitfalls are not defects for which the company is liable. Thus a railroad company is not guilty of negligence in placing a weighing machine, of the usual description, on its platform, near the luggage counter, for the purpose of weighing luggage, and is therefore not responsible for injuries sustained by one who in broad daylight was pressed by a crowd of passengers against the machine, caught his foot in it, and fell over it.[8] Neither is a railroad company guilty of negligence in depositing freight on the platform at a flag station, and is not liable to a passenger, who in broad daylight stumbles over a package while on his way to the train.[9] And a passenger who stumbles over the feet of a baggage master while he is removing baggage from the car in the ordinary manner, when 10 feet in width of the platform is not obstructed by him, cannot recover, since there is no negligence on the baggage master's part.[10] But a box containing signal levers, projecting about two inches above the level of the platform, is a concealed defect as to a passenger going over the platform with a crowd of other passengers, and a jury is warranted in holding the company liable to the passenger for injuries sustained in stumbling over the projection in the crowd.[11]

[8] Cornman v. Railway Co., 4 Hurl. & N. 781; Blackmau v. Railway Co., 17 Wkly. Rep. 769.

[9] Falls v. Railroad Co., 97 Cal. 114, 31 Pac. 901.

[10] Connor v. Railroad (N. H.) 30 Atl. 1121. A railway company is not chargeable with negligence because it leaves a baggage truck on its platform, so that a passenger endeavoring to board a moving train stumbles against it, and is injured. Haldan v. Railway Co., 30 U. C. C. P. 89.

[11] Sturges v. Railway Co., 56 J. P. (Eng.) 278.

The duty of care in respect to its station platforms does not always end with that portion designed for the use of passengers. The fact that a portion of a station platform was originally designed for freight and baggage use does not render a passenger thereon a trespasser, where the whole forms one continuous platform, and has been uniformly used for the accommodation of passengers without objection by the railroad company.[12] A railroad company having a telegraph office in one of its stations for the use of the public is responsible to one of its passengers, who is injured solely because of the company's negligence in failing to keep in proper condition the structure or platform erected by it, over which the passenger, in alighting from the cars, must pass to reach the telegraph office.[13] A railway company which maintains a stairway leading from its depot to a platform owned and constructed by an express company must take proper steps to guard passengers from taking that way to leave its premises, if the way is unsafe; and, in the absence of any precautions, it is liable to a passenger, a stranger, who descended the stairway, and, thinking the lower platform of the express company

[12] Waller v. Railway Co., 59 Mo. App. 410. But where a railroad company has provided a well-lighted and convenient platform for passengers on one side of its station building, about two feet lower than the approaches leading to a freight platform on the other side of the building, with no steps between the two platforms, a passenger waiting for a train, and knowing these facts, goes on the freight platform at his own risk, and cannot recover for injuries sustained by falling into an unguarded pit on the freight platform. Gunderman v. Railway Co., 58 Mo. App. 370.

[13] Clussman v. Railroad Co., 9 Hun, 618.

to be on a level with the street, stepped therefrom, and fell four feet to the ground.[14]

§ 50. SAME—ADJUSTMENT BETWEEN PLATFORM AND TRAINS.

A railroad company which receives its passengers from a space between parallel tracks is bound to provide such safeguards as will protect the passenger, in the exercise of ordinary care, from injury from passing trains.[1] Thus it is negligence to construct, for the use of passengers, a platform only five feet wide, leaving only a little over two feet of clear space when passenger trains going in opposite directions meet at the station, and a passenger on the platform, and about to take a train, may recover for injuries sustained in being struck by a train on the other track.[2] It has even been held that the fact that an intending passenger was struck by a passing train which projected over the

[14] Beard v. Railroad Co., 48 Vt. 101. "The open stairs on the margin of the platform led the plaintiff, without fault on her part, to the point of harm. They baited her into the unseen trap,—a trap well known to the defendant. They were the alluring and deluding opening to the fatal pitfall. The fact that the bottom of the pitfall on which plaintiff landed, and thereby received the hurt, was beyond the line of ownership of defendant, neither relieves the duty nor mitigates the fault of the defendant."

§ 50. [1] Union P. Ry. Co. v. Sue, 25 Neb. 772, 41 N. W. 801.

[2] Chicago & A. R. Co. v. Wilson, 63 Ill. 167. But where the platform is of sufficient width to afford abundant room for safety, it is not negligence to so build it that the edge of the platform cannot be occupied in safety as a standing place while a train is passing. Chicago, B. & Q. R. Co. v. Mahara, 47 Ill. App. 208.

platform from one to three inches is sufficient evidence of negligence to take the case to the jury.[3]

The bare fact that, owing to a curve in an elevated railway track, an opening eight inches wide exists between the station platform and the ends of the car steps, is not evidence of negligence, since such an opening is the necessary and inevitable result of the practical operation of the road. And since the railway follows the street, and must reproduce its curves, and since the locality of any station is determined by public convenience, the presence of the curve, and the location of the station upon it, is not negligence.[4] So where station premises are well lighted, it is not the carrier's duty to bring home notice to each passenger of an open space about a foot wide between the car steps and the station platform; but a general warning, such as in the ordinary course of things would be likely to reach all the passengers on their way out, is sufficient.[5]

§ 51. APPROACHES.

The duty of a railroad company as a carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also exercise care to provide safe means of ac-

[3] Dobiecki v. Sharp, 88 N. Y. 203. So held where passing cars extend 18 inches beyond edge of platform. Houston & T. C. Ry. Co. v. Reason, 61 Tex. 613.

[4] Ryan v. Railway Co., 121 N. Y. 126, 23 N. E. 1131, reversing 49 Hun, 609, 1 N. Y. Supp. 899; Fox v. City of New York, 70 Hun, 181, 24 N. Y. Supp. 43. But see post, § 54.

[5] Langin v. Brooklyn Bridge, 10 App. Div. 529, 42 N. Y. Supp. 353.

cess to and from its stations for the use of passengers, and passengers have the right to assume that the means of access provided are reasonably safe.[1] It is the duty of a railroad company to furnish passengers a safe and convenient passage from its depot to the highway,[2] and if it fails to do so, and passengers are in consequence compelled to walk along the track to reach the highway, the company is liable for the death of a passenger who fell into a cattle guard covered with snow, and who was unable to extricate herself before she was run into by an engine.[3] It is negligence in a railroad company to leave unguarded on a dark night a hole in a passageway at a railroad station likely to be employed by a passenger going to and from the train,[4] and a hole so near the walk used by the public in going to and from the depot to the cars that a man, in the ordinary aberrations of travel, may fall into it in the nighttime, should be guarded by the company.[5] To permit a bridge over a public street in the immediate vicinity of the depot to be uncovered and unprotected while undergoing repairs is negligence on the part of the company, which will render it liable for injuries to a passenger who in the nighttime, on his way to a train, fell through the bridge.[6] A railroad company which sells tickets good over a connect-

§ 51. [1] Delaware. L. & W. R. Co. v. Trautwein, 52 N. J. Law, 169, 19 Atl. 178; Burnham v. Railway Co., 91 Mich. 523, 52 N. W. 14.

[2] Hulbert v. Railroad Co., 40 N. Y. 145.

[3] Hoffman v. Railroad Co., 75 N. Y. 605, affirming 13 Hun, 589.

[4] Green v. Pennsylvania Co., 36 Fed. 66.

[5] Cross v. Railway Co., 69 Mich. 363, 37 N. W. 361.

[6] Chicago & N. W. R. Co. v. Fillmore, 57 Ill. 265.

ing line of steamers, and which requires its passengers to disembark at its depot 40 rods from the steamer, continues to be liable as a common carrier until, in the ordinary course of their passage over the wharf, the passengers reach the point where the liability of the steamboat company commences.[7] But the fact that gravel and small pieces of wood were on a sidewalk in

[7] Knight v. Railroad Co., 56 Me. 234. A railroad company which constructs and maintains a way, in part for its own benefit and profit, to be used by all who, for purposes of business, desire to pass from the cars to its wharf boat, moored at an established landing in a public navigable river, is bound to exercise ordinary care and prudence to keep the way in repair for the safety of those who use it for the purpose for which it has been appropriated. Bennett v. Railroad Co., 102 U. S. 577. It is a question of fact for the jury whether a railroad bridge 229 feet from the depot, and 20 feet from a water tank, and planked between the rails, is a part of the station grounds, so as to render the company liable for the death of a drover, who, while the train was stopping at the water tank, went on the bridge towards the engine to look after his cattle, and who in the dusk stepped over the edge of the bridge, which was without railing or protection. Illinois Cent. R. Co. v. Foley, 3 C. C. A. 589, 53 Fed. 459. One who was injured while passing over a foot walk on a public street, about 40 feet from a bridge constructed by a railroad company, and leading to its depot, has the burden of showing that the walk was constructed by the company, and under its possession and control, as one of the approaches to its station. Quimby v. Railroad Co., 69 Me. 340. A jury is warranted in finding that a passageway from a waiting room to its railroad tracks, so narrow that a passenger walking along it is thrown therefrom by the sudden turning around of a person in front of her, is not a reasonably safe structure. Redner v. Railway Co., 73 Hun, 562, 26 N. Y. Supp. 1050. Gen. St. Conn. § 3531, requires railroad companies to maintain a safe approach for carriages to all its passenger stations from contiguous or neighboring highways, and prohibits the obstruction of such approaches for a reasonable time before and after the departure of passenger trains.

front of a station building, the roof of which was undergoing repairs, is not evidence of negligence, in the absence of evidence that they had been there an unreasonable length of time.[8]

To stock drovers and others accepted as passengers on freight trains the company owes the duty of exercising proper diligence to provide them with safe approaches to all parts of its station grounds where the reasonable prosecution of their business may require them to go; and when a drover, in going from the depot to the stock pen, where his train is being made up, is compelled to cross a high trestle bridge, the company owes him the duty of exercising care to make the bridge reasonably safe to cross.[9]

§ 52. OWNERSHIP BY THIRD PERSONS.

The ownership by third persons of any portion of the station grounds or approaches used by a common carrier in receiving and discharging passengers will not affect his liability as such. The duty of a carrier to exercise a proper degree of care to keep approaches to its station grounds in repair is not affected by the fact that it has constructed such approaches over land

[8] O'Reilly v. Railroad Co., 4 App. Div. 139, 38 N. Y. Supp. 779.

[9] Texas & P. Ry. Co. v. Hudman, 8 Tex. Civ. App. 309, 28 S. W. 388. But see Dillaye v. Railroad Co., 2 Alb. Law J. 356, overruling 56 Barb. 30, where it was held that the conveyance of such passengers as succeed in getting on a freight train, or the receipt of fare from them, cannot be justly considered as a general invitation to the public to ride in that way at their pleasure, nor as imposing the duty of making a convenient path or mode of access to the rear car of a freight train.

not owned by it, but forming part of a highway.[1] A steamboat company which lands its passengers on a wharf not owned by it makes such wharf a part of its own means of landing, and is liable to its passengers the same as if it owned the premises.[2] A carrier by sea who employs a hulk owned by other persons for the purpose of embarking passengers on his steamer is liable for injuries sustained by a passenger by reason of a hatchway on the hulk being negligently left unguarded, though the hulk is under the control of the owners, and not of the carrier, since it is a part of the means of transportation, and it is the carrier's duty to use reasonable care for its safety.[3] Two railroad companies which use in common a platform extending from the station house of one of them to that of the other, and over which their passengers may be expected to pass in going from one station to the other, are bound to keep it in safe condition, and are jointly liable for injuries resulting from their failure to do so.[4] The fact that third persons have trespassed on the station grounds of a railroad company does not excuse its failure to keep the premises in reasonable repair for the safety of its passengers, where the trespass is not accompanied by an exclusive possession by the trespassers.[5] A railroad company is liable for injuries to

§ 52. [1] Skottowe v. Railway Co., 22 Or. 430, 30 Pac. 222. See, also, post, c. 26, as to connecting and leased lines.

[2] Buddenberg v. Transportation Co., 108 Mo. 394, 18 S. W. 970.

[3] John v. Bacon, L. R. 5 C. P. 437.

[4] Lucas v. Pennsylvania Co., 120 Ind. 205, 21 N. E. 972; Louisville, N. A. & C. Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968.

[5] Gulf, C. & S. F. Ry. Co. v. Glenk, 9 Tex. Civ. App. 599, 30 S. W.

a passenger sustained by reason of a defect in a platform leading from the train to an eating house, though the platform was constructed by hotel people, and had not been used by the railroad company for some time, where it was located on the company's right of way.[6] But where a railroad company leases land to one who erects a restaurant and eating house thereon, the fact that such restaurant is patronized by travelers on and employés of its road does not render it liable for the negligence of its lessees in not keeping the approaches in good order; such restaurant not being used by it as a station or place to accommodate travelers. Those who enter the eating house do so under the implied invitation given them by its keeper and owner, and not upon any invitation extended them by the railroad company; and in such case the tenant, and not the landlord, must be liable for any injury resulting from defects in the rented premises.[7]

278. Where the platform at a station is too high to be conveniently reached, and some one has provided a plank leading up to the platform, which has been used since the depot was built, the company is as much liable for injuries arising from defects in the plank as if it had set up and maintained the dangerous way. Collins v. Railway Co., 80 Mich. 390, 45 N. W. 178. A railroad company is bound to exercise due care to keep in repair a bridge over a gully on its station grounds, used by passengers on leaving the grounds, though the bridge has been erected by strangers to the company. Chance v. Railway Co., 10 Mo. App. 351.

[6] East Tennessee, V. & G. R. Co. v. Watson, 94 Ala. 634, 10 South. 228; Id., 92 Ala. 320, 8 South. 770.

[7] Texas & P. Ry. Co. v. Mangum, 68 Tex. 342, 4 S. W. 617.

§ 53. SNOW AND ICE.

A railroad company must exercise care to keep its platform free from ice and snow.[1] While it is not bound to keep its platform in such a condition as to make it impossible for any passenger to slip, it should keep the platform in such a condition that a person using ordinary care, which people use when not apprised of danger, would not slip. The company is bound to be on the alert during cold weather, and to see whether there is ice upon the platform, and to remove or make it safe by sanding it or putting ashes upon it.[2] The unexplained presence of a strip of ice, nearly an inch thick, on a station platform, and having the appearance of having been there for some time, is evidence of negligence, in an action by a passenger, who was waiting on the platform for the arrival of a train, and who, not observing the ice, slipped upon it, and fell, sustaining severe injuries.[3]

The same principles apply to ice and snow on car steps and platforms. Thus, in an action for injuries sustained in slipping on an icy car step, the question whether the ice has been permitted to remain for an unreasonable length of time is for the jury, where there is evidence that the ice was there the day before the accident.[4]

§ 53. [1] Louisville & N. R. Co. v. Cockerel (Ky.) 33 S. W. 407.

[2] Weston v. Railroad Co., 73 N. Y. 595, affirming 42 N. Y. Super. Ct. 156; Chicago & N. W. Ry. Co. v. Smith, 59 Ill. App. 242; Timpson v. Railway Co., 52 Hun, 489, 5 N. Y. Supp. 684.

[3] Shepherd v. Railway Co. (1872) 25 Law T. (N. S.) 879.

[4] Neslie v. Railway Co., 113 Pa. St. 300, 6 Atl. 72.

§ 54. LIGHTS.

The duty to exercise care to provide safe platforms and approaches to trains and stations includes the duty of properly lighting at night the depots and approaches to and from the trains.[1] This rule is violated by a railroad company, which, for any reason, leaves one or more coaches of a passenger train outside the depot yard or station grounds at which the train stops, thus obstructing at night lights so placed by the city as to illuminate both sides of the track on which the train stands.[2] But when the place is a

§ 54. [1] Buenemann v. Railway Co., 32 Minn. 390, 20 N. W. 379; Reynolds v. Railway Co., 37 La. Ann. 694; Texas & P. Ry. Co. v. McKenzie, 2 Posey, Unrep. Cas. (Tex.) 307; Sargent v. Railway Co., 114 Mo. 348, 21 S. W. 823; Fordyce v. Merrill, 49 Ark. 277, 5 S. W. 329; Groll v. Railroad Co., 51 Hun, 643, 4 N. Y. Supp. 80; Patten v. Railway Co., 32 Wis. 524.

[2] Moses v. Railroad Co., 39 La. Ann. 649, 2 South. 567. The duty of lighting approaches includes the duty of providing sufficient lights for the safety of passengers going to and from eating stations at night. Peniston v. Railroad Co., 34 La. Ann. 777. Where there is evidence that a passenger was injured in stepping from a moving train upon an unlighted platform, the court properly submitted to the jury, as a ground of recovery, the negligence of the railroad company in failing to provide proper lights for the accommodation of its passengers in leaving the cars at night, although no witness testified directly that the lack of lights contributed to the injury, or that the accident would not have occurred had the platform been properly lighted. "There are, perhaps, but few of us who have not at some time, while walking or leaping in the dark, been disagreeably surprised by striking the foundation a little earlier or a little later than we expected, and have fully realized that the danger of receiving injury under such circumstances is much enhanced by not being provided with sufficient lights, and it was not

country station, without municipal government, having neither gas, electric, nor outdoor lights, and there are indoor lights in the station house, the company may omit outdoor lights in conformity to the rules and practice generally in use by other prudently conducted companies.[3]

Especially is it the duty of the company to provide lights at night, where for any reason there are pitfalls or obstructions on its platform. Thus, where an elevated railroad constructs a platform on a curve, so that there is necessarily a space 14 inches wide between the car steps and the station platform, the duty rests on it to light the unguarded hole, so that passengers alighting in the nighttime may see and avoid the danger.[4] Bringing a train to a standstill on a dark evening, with the station dimly lighted, at a point where there are 18 inches or 2 feet between it and the platform, coupled with the fact that the guard opened the door, and thus impliedly invited plaintiff to alight, is sufficient evidence of negligence to take the

necessary for a witness to tell the jury this." Eddy v. Still, 3 Tex Civ. App. 346, 22 S. W. 525.

[3] Alabama G. S. R. Co. v. Arnold, 84 Ala. 160, 4 South. 359. A railroad company is not under any obligation to so place its lights at a depot as to enable employés on freight trains to discover a drunken person, who, during the nighttime, lies down on the track near the depot. Rozwadosfskie v. Railway Co., 1 Tex. Civ. App. 487, 20 S. W. 872.

[4] Boyce v. Railway Co., 118 N. Y. 314, 23 N. E. 304, affirming 54 N. Y. Super. Ct. 286. Failure to light a platform three feet above the ground is negligence, entitling a passenger who falls from the platform in the dark to recover for injuries sustained. Stafford v. Railroad Co., 22 Mo. App. 333.

case to the jury.[5] The same principle applies to ferries. A ferry company is guilty of negligence in landing one of its ferryboats at night in such a manner as to leave on open space between the boat and the dock without guards or lights, and it is liable to a passenger who falls into the open space on leaving the boat.[6] So while a railway company is bound to provide but one safe way of approach to and egress from its station, it is guilty of negligence if it provides no means by which that way is apparent to passengers alighting in the nighttime, and if it leaves them to grope their way from the depot platform without sufficient light to encounter dangers that cannot be discovered.[7]

The duty to furnish lights at night rests on the company, not only on the arrival and departure of trains, but for a reasonable time before and after their departure.[8] What is a reasonable time generally de-

[5] Praeger v. Railway Co., 24 Law T. (N. S.) 105. Where a station platform is so constructed that there is an open space between it and the steps of the car, it is a question for the jury whether it is negligence on the part of the company not to have the place so lighted that a passenger leaving the car in a crowd can see the open space. Fox v. City of New York, 5 App. Div. 349, 39 N. Y. Supp. 309.

[6] Holmes v. Railway Co., 5 Fed. 523; Drake v. Town of Dartmouth, 25 Nova Scotia, 177.

[7] Texas & P. Ry. Co. v. Brown, 78 Tex. 397, 14 S. W. 1034. Where a passenger is injured in the evening, by falling over articles taken out of the van of the train by which he traveled, it is for the jury to say whether it is negligence to leave the platform unlighted, though it is nearly dark, and whether the position in which the articles were placed showed negligence. Burke v. Board, 9 Vict. Law R. 350.

[8] Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 4 South. 359, limiting Montgomery & E. Ry. Co. v. Thompson, 77 Ala. 448; Grimes

pends on the circumstances of the case, and is for the jury.[9] But a railroad company is not bound to light its platform half or three-quarters of an hour in advance of the leaving time of a train, and a passenger who, in the dark, and so long in advance of the schedule time, attempts to board cars not in readiness for passengers, cannot recover for injuries sustained in a fall between the platform and the cars.[10] Where, however, a passenger arrives at her destination at nearly midnight, and the company refuses to deliver her luggage unless she herself identifies it, the company is bound to keep the station lighted until she has had the opportunity to identify the luggage; and where the lights are put out while she is in the parcels office to identify the luggage, and she falls from the platform after leaving the office, the company is liable.[11]

The rule in respect to lights applies as well to carriers by vessels as to carriers by railroad. Thus a steamboat company which discharges a passenger over a gangway having no guard rails is chargeable with negligence in failing to have the gang plank properly lighted at night, so as to prevent passengers from falling off the sides.[12]

v. Pennsylvania Co., 36 Fed. 72; Waller v. Railway Co., 59 Mo. App. 410.

[9] Grimes v. Pennsylvania Co., 36 Fed. 72.

[10] Hodges v. Transit Co., 107 N. C. 576, 12 S. E. 597.

[11] Black v. Board, 1 Vict. Law R. 12.

[12] Miller v. Steamboat Co., 73 Hun. 150, 25 N. Y. Supp. 924. A ferry company, which, at the very threshold of its gate, places a log, against which its passengers are in danger of stumbling in the dark, is bound to do everything in its power to guard against the danger

The duty to light their depots is imposed on railroad companies by statute in Texas.[13] This statute imposes on them the duty of lighting only such platforms or approaches as are necessary for ingress and egress of passengers, and the question as to what portions should be lighted is ordinarily one of fact for the jury.[14] But a railroad company cannot escape liability for failure to comply with this statute by contracting with another company to light the depot.[15]

If it omits to place a light near the obstruction, for the protection of passengers upon its boats, it is guilty of negligence. Osborn v. Ferry Co., 53 Barb. 629.

[13] Sayles' Supp. Rev. St. art. 4238 (Laws 1889, p. 19).

[14] Texas & P. Ry. Co. v. Reich (Tex. Civ. App.) 32 S. W. 817.

[15] Id.

CHAPTER IV.

DUTY OF CARE IN RECEIVING AND DISCHARGING PASSENGERS.

§ 55. Degree of Care Required.
56. Safe Facilities.
57. Same—Duty to Afford Passengers the Use of Stational Facilities.
58. Same—Invitation to Alight.
59. Same—Failure to Bring Train up to Platform.
60. Same—Personal Assistance.
61. Same—Moving Trains on Intervening Tracks.
62. Same—Existence of Safe and Unsafe Exit.
63. Same—Freight Trains.
64. Same—Street Cars.
65. Same—Vessels.
66. Reasonable Time to Get On and Off.
67. Same—Signals for Starting.
68. Same—Sudden Movement of Train after Invitation to Get On or Off.
69. Same—Direction to Leave Moving Train.
70. Same—Specific Rules as to Receiving and Discharging Passengers.
71. Same—Freight Trains.
72. Same—Street Cars.
73. Same—Elevators.

§ 55. DEGREE OF CARE REQUIRED.

The rule requiring the carrier to exercise the highest practical degree of care applies to the process of receiving the passenger on, and in discharging him from, the vehicle.

While the weight of authority is that, as to the construction and maintenance of stational facilities, the

carrier is bound to only ordinary care,[1] no relaxation of the general rule governing his liability has been attempted, so far as the process of receiving and discharging passengers is concerned. "It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance, not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so." [2] "A railroad company owes to a passenger the duty, not only of using the utmost care and caution in carrying him, but also the same care and caution in stopping and starting its trains at the station to which it has agreed to carry him." [3] In an action for injuries sustained by a passenger on his way from the train to the station house, caused by being struck by an engine on an intervening track, it was said: "The plaintiff was a passenger, and while that relation existed the defendants were bound to exercise towards him the utmost care and diligence in providing against those injuries which can be avoided by human foresight. He was entitled to this protection, so long as he conformed to the reasonable regulations of the company, not only while in the cars, but while upon the premises of the defendants; and this requires of the defendants due regard for the safety of passengers, as well in the location, construction, and arrangement of their station

§ 55. [1] See ante, § 47.

[2] Louisville & J. Ferry Co. v. Nolan, 135 Ind. 60, 34 N. E. 710.

[3] Straus v. Railroad Co., 86 Mo. 421. See, also, Waller v. Railroad Co., 83 Mo. 608.

buildings, platforms, and means of egress, as in their previous transportation." [4]

Of course, here, as elsewhere, the carrier is not responsible for injuries happening without fault on its part. Thus, where a brakeman, standing on the rails of two car platforms in the performance of his duties, accidentally slips, and falls against a passenger ascending the car steps, the company is not liable for injuries to the passenger, as there is no negligence, and the risk of such an accident is assumed by the passenger.[5] So, a railroad company is not responsible for

[4] Gaynor v. Railway Co., 100 Mass. 208, 215. The same principle is laid down in Atchison, T. & S. F. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108, and Central Railroad v. Whitehead, 74 Ga. 441. In Leggett v. Railroad Co., 143 Pa. St. 39, 21 Atl. 996, it is said: "It is the undoubted duty of a railroad company, not only to carry the passenger safely, but to set him down safely at the place of destination, if, in the exercise of the utmost care, it could be done." In Texas & P. Ry. Co. v. Miller, 79 Tex. 78, 15 S. W. 264, it is said: "A railroad company must exercise the highest degree of care towards a passenger alighting, in reference to the movement of the train at the station; for over such movement the passenger has no more control in the one case than in the other, and must trust wholly to the carrier, as does he when sitting in the car as to the rate of speed, or any other matter affecting his safety." See, also, St. Louis, A. & T. Ry. Co. v. Finley, 79 Tex. 85, 15 S. W. 266; Houston & T. C. R. Co. v. Dotson (Tex. Civ. App.) 38 S. W. 642. In Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296, the rule is stated as follows: "It is the duty of every railway company to cause its passenger trains to stop at each station advertised as a place for receiving and discharging passengers a sufficient length of time to receive and let off passengers with safety, and to provide a reasonably safe way of reaching and departing from their cars at all usual stations; and it is the duty of passengers to exercise ordinary care for their safety on attempting to take passage on a railway car."

[5] Skinner v. Railroad Co., 39 Fed. 188.

injuries to an inexperienced passenger, who, in the confusion and excitement of her first trip on a railroad, and while the train is stationary, slips or is pushed from the car platform on the side opposite the one she has ascended, and falls down an embankment.[6] But a railroad company is responsible for the consequences of negligence in giving directions to passengers as to the mode of entering cars.[7]

§ 56. SAFE FACILITIES.

It is the duty of a carrier of passengers to exercise due care in providing safe facilities to enable passengers to get on and off his vehicle.[1]

This principle runs all through the subject, as the following sections more fully show. It is the duty of a railroad company, before the departure of the passenger train at the station, to clear the way by the removal of freight trains between it and the depot buildings, so that passengers can approach the passenger train with safety; and, if a passenger is prevented by lack of time from walking around the freight train, the company is liable for injuries sustained by him in climbing between the freight cars, provided he is not guilty of contributory negligence in so doing.[2] A

6 Chicago, St. L. & N. O. R. Co. v. Trotter, 61 Miss. 417.

7 Allender v. Railroad Co., 43 Iowa, 276.

§ 56. 1 Texas & P. Ry. Co. v. McLane (Tex. Civ. App.) 32 S. W. 776; Richmond City Ry. Co. v. Scott, 86 Va. 902, 11 S. E. 404. As to stational facilities, etc., see the preceding chapter.

2 Chicago & N. W. Ry. Co. v. Coss, 73 Ill. 394. As to contributory negligence of passenger in climbing between freight cars, see post, § 141.

jury is justified in finding a railroad company guilty of negligence in stopping a train in such a position that the forward end of a passenger car is opposite a truck 37 feet long, and 7 feet wide, with its top on a level with the platform of the cars, so that passengers getting out at the forward end are obliged to step on the truck.[3] But if, at a flag station, the place selected by the company to receive and discharge passengers is ordinarily safe and convenient for that purpose, the company is not bound to furnish special facilities to keep passengers off the wet ground in time of much rain; and is not liable for a passenger's illness, caused by getting her feet wet in alighting at this place.[4]

§ 57. SAME—DUTY TO AFFORD PASSENGER THE USE OF STATIONAL FACILITIES.

The duty of furnishing reasonably safe facilities for passengers to get on and off the train includes the duty of stopping the train in such a manner that passengers may avail themselves of these facilities. A railroad company which negligently and wrongfully carries a passenger beyond the usual stopping place, into what is practically its switching yard, where there is no accommodation for passengers, and where it knows there is special risk and hazard, is bound to use every precaution for his protection.[1] If a passenger is carried some distance beyond the station, it is the company's duty, either to back the train to a con-

[3] Bethmann v. Railroad Co., 155 Mass. 352, 29 N. E. 587.

[4] Alabama & V. Ry. Co. v. Stacy, 68 Miss. 463, 9 South. 349.

§ 57. [1] Franklin v. Motor Road Co., 85 Cal. 63, 24 Pac. 723.

venient place near the station, or to give him such instructions and assistance as are necessary to assure his safe return to the station house.[2]

The duty of furnishing reasonably safe facilities applies not alone to stations.[3] If the conductor of a railroad agrees to put a passenger off at a particular place, whether it be a regular station or stopping place or not, it is the conductor's duty so to stop the cars at that place that the passenger can get off in safety.[4] If a train stops near a station where there is no platform, and a passenger is told by a servant of the company that she may get out there if she wishes, and in doing so she injures herself, it is for the jury to say whether the company has been guilty of negligence.[5] So a railroad company is liable for an injury to a pas-

[2] New York, C. & St. L. Ry. Co. v. Doane, 115 Ind. 435, 17 N. E. 913. A railroad company is guilty of negligence in causing a female passenger to alight on a very dark night in its yards about 200 yards from the depot, and the company is liable in damages for injuries sustained by her in an attempt to make her way to the depot. Warden v. Railway Co., 35 Mo. App. 631. It is a question of fact whether or not a railroad company is guilty of negligence in constructing a cattle guard near its station, without any necessity for placing it there; and a passenger who falls into it in the dark, while on the way to the train, pursuant to the invitation of the train hands, may recover. Lawrence v. Canal Co., 21 N. Y. Wkly. Dig. 41.

[3] See, also, ante, § 46.

[4] Western R. Co. v. Young, 51 Ga. 489. It cannot affect the rule that a passenger had a ticket only to the station last passed, before reaching the place at which he was put off. The conductor had the power to demand and receive any additional fare accruing for carrying the passenger to a point beyond the station to which his ticket entitled him to be carried. Id.

[5] Foy v. Railroad Co., 18 C. B. (N. S.) 225.

senger, caused by the negligence of the trainmen in putting her off in the nighttime at a rough place, more dangerous than the crossing where passengers were usually put off, and where she supposed she was being put off, there being no depot in the neighborhood.[6]

A railroad company is guilty of negligence in stopping a freight train, on which it is carrying a passenger, within 3 or 4 feet of a retaining wall 5 or 6 inches high on the side nearer the track, and 15 or 20 feet from the ground on the other side; and it is liable for injuries to a passenger who is directed to alight in this place in the nighttime, without notice of the danger, and who, after his feet had repeatedly struck the side of the wall near the track, made two steps towards its edge, and fell over.[7] A conductor who promises to transfer a shipper of stock from his train going east to one going west, at a station, is guilty of negligence in making the transfer at a different and dangerous place, without notifying him of the change, or warning him of the danger; and the railroad company is liable for injuries sustained by the shipper in falling into a deep waterway, in the dark, on the railroad right of way.[8]

[6] Houston & T. C. R. Co. v. Smith (Tex. Civ. App.) 33 S. W. 896, affirming 32 S. W. 710.

[7] Central Railroad & Banking Co. v. Smith, 80 Ga. 526, 5 S. E. 772; Id., 76 Ga. 209.

[8] Griffith v. Railway Co., 98 Mo. 168, 11 S. W. 559. A shipper of stock, riding in the stock car with his cattle, asked the conductor for oil for a lantern. The conductor told him to come back to the caboose at the next stop, and the oil would be supplied. In attempting to go back in the dark at the next stop, in obedience to this direction, the drover was precipitated into a culvert, over

But the officers of a railroad company have a right to presume that passengers will attempt to get on and off its cars only at the place designated by the company for that purpose, and it is not the duty of a railroad company to keep its track clear for those who may see proper to pursue the cars while leaving the depot; and more especially would this be true as to those who pursue the cars to a point beyond that assigned by the company for receiving and discharging passengers.[9] And a passenger who has remained in the train through his own fault, when it stopped at his station a sufficient length of time to enable him to get off, cannot recover against the company for injuries sustained in alighting at a place half a mile away, owing to the nature of such place, since the company is not required to furnish a safe place to him.[10] Where a passenger, carried past the station platform, declines the conductor's offer to back the train to the station, and requests to be put off where the train then is, the carrier is not chargeable with negligence in carrying her past her destination, and is not liable for injuries sustained by her in alighting there, unless it has been guilty of negligence in the discharge of its new obligations.[11]

which a portion of the train was standing, and he was injured. Held, that the conductor was acting in the line of his duty, and that the company was liable for the injuries, since the passenger was obeying the conductor's express directions. Nurse v. Railway Co., 61 Mo. App. 67.

[9] Perry v. Railroad, 66 Ga. 746.

[10] Texas & P. Ry. Co. v. Woods, 8 Tex. Civ. App. 462, 28 S. W. 416.

[11] Conwill v. Railway Co., 85 Tex. 96, 19 S. W. 1017. A railroad

Sometimes a train stops before reaching a station, and a passenger, thinking that the train has arrived at his destination, gets out, and is injured by reason of the dangerous character of the premises. In these cases the question of the company's negligence turns on the question whether there has been an invitation to the passenger to alight, and this subject will be next considered.

§ 58. SAME—INVITATION TO ALIGHT.

When the name of a passenger's station is called, and soon thereafter the train is brought to a standstill, a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the circumstances and indications are such as to render it reasonably manifest that the train has not reached the usual and proper landing place.[1] This

company is under no obligation to furnish a safe exit for a passenger at a point several hundred yards from its station; nor, unless its own announcement and direction has put him out there, or it has declined to retake him on board, is it under obligation to afford him help in his exit from that place, if he has with foolhardiness put himself there, and declares he will take care of himself. Central Railroad v. Thompson, 76 Ga. 770. A passenger who gets on a wrong train, and who voluntarily leaves it at a junction point, half or three quarters of a mile from the station, to take the right train, which is pointed out to him by the conductor, assumes the risk of ordinary obstructions on the track; and cannot recover for injuries sustained by falling into a cattle guard in the dark. Finnegan v. Railway Co., 48 Minn. 378, 51 N. W. 122.

§ 58. [1] Hooks v. Railway Co., 73 Miss. 145, 18 South. 925; Smith v. Railway Co., 88 Ala. 540, 7 South. 119; Memphis & L. R. Ry. Co. v. Stringfellow, 44 Ark. 322; Devine v. Railway Co. (Iowa) 69 N. W. 1042. The calling of a station by the employés of a carrier is notice

proposition rests on reason and experience, is justified by custom, conforms to the understanding of railroad carriers and the traveling public, and is maintained by the strong current of authority.[2] In this country it is the almost universal practice to announce the station which the train is approaching before it is reached, and while the train is still in motion; and it is universally understood that such announcement is intended as notice to the passenger, without warning to the contrary, that the next stop of the train will be at the station announced. The purpose is understood to be to enable the passengers intending to alight at that station to be ready to leave the cars promptly, without undue haste or inconvenience to themselves, or unnecessary delay to the train.[3] The cases illustrating this proposition are quite numerous. Where the name of a station is called, and the train is halted shortly afterwards in the nighttime, the jury may find the carrier guilty of negligence, in an action by a passenger, who, believing the train at the station, stepped from the car, and fell through a trestle on which the train had stopped.[4] Where a passenger's station is

to passengers bound for that station to alight when the train stops there. Houston & T. C. R. Co. v. Dotson (Tex. Civ. App.) 38 S. W. 642.

[2] Richmond & D. R. Co. v. Smith, 92 Ala. 237, 9 South. 223.

[3] Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204. It may be carelessness, according to circumstances, in a railroad company to notify passengers in the nighttime that a station is at hand, and then stop the train short of such station. Central R. Co. v. Van Horn, 38 N. J. Law, 133; Falk v. Railroad Co., 56 N. J. Law, 380, 29 Atl. 157.

[4] International & G. N. R. Co. v. Eckford, 71 Tex. 274, 8 S. W.

called, the question whether the company is guilty of negligence in stopping the train in the nighttime some distance from the station, near a ditch, is a question for the jury, in an action by a passenger for injuries sustained in falling into the ditch.[5] The question as to whether train hands are guilty of negligence, after announcing a station, in stopping the train short of it, in the nighttime, without notifying passengers that they had not reached it, and with a freight train approaching on a parallel track, is one for the jury.[6]

Of course, the case is stronger for the passenger when the train hands do some act, in addition to calling the name of the station and stopping the train. A passenger is justified in believing that her train is at the depot platform, where the name of the station is announced, the train stopped, and a brakeman assists her to alight in the dark.[7] A conductor who informs a passenger that the next stop will be at her destination, and takes up her check, is guilty of negligence in failing to inform her that her destination has not been reached, when the train is stopped by an un-

679; McGee v. Railway Co., 92 Mo. 208, 4 S. W. 739; Philadelphia, W. & B. R. Co. v. McCormick, 124 Pa. St. 427, 16 Atl. 848.

[5] Miller v. Railway Co., 93 Ga. 630, 21 S. E. 153; Columbus & I. C. Ry. Co. v. Farrell, 31 Ind. 408.

[6] Boss v. Railroad Co., 15 R. I. 149, 1 Atl. 9. Where, on approaching a station, a brakeman calls out its name, it is negligence to stop the train in the nighttime some distance from the station, and a passenger injured in getting off may recover. Ward v. Railway Co., 165 Ill. 462, 46 N. E. 365, reversing 61 Ill. App. 530.

[7] Louisville, N. A. & C. Ry. Co. v. Holsapple, 12 Ind. App. 301, 38 N. E. 1107.

expected signal, in the nighttime, at an unusual place.[8]

It must be borne in mind, however, that the circumstances and indications may be such as to render it reasonably manifest that the train has not reached the usual and proper landing place, notwithstanding the fact that the name of the station has been announced, and the train brought to a standstill. Thus, calling out the name of a station is not an invitation to a passenger to alight in broad daylight, when the train comes to a standstill at a railroad crossing, where there is nothing at that spot to indicate a landing place, and there is, at the proper place, a short distance further on, a building and platform appropriate and used for that purpose.[9]

It will be noticed that it is the combination of the announcement of a passenger's station, and the stoppage of the train shortly afterwards, that constitute

[8] Pennsylvania Co. v. Hoagland, 78 Ind. 203. A drover on a stock train, accompanied by two boys, was told by the conductor that the train had arrived at the town of his destination, and to get ready to get off. Shortly afterwards the train stopped, moved forward slowly, and again stopped. The night was dark, and, when the train stopped the second time, the drover, with his two boys, went on the platform, and one of the boys was thrown therefrom by the sudden starting of the train. Held, that it was a question for the jury whether or not the drover was authorized to believe that he was expected to alight from the car at the time and place he attempted to do so. Texas & P. Ry. Co. v. Garcia, 62 Tex. 285.

[9] Mitchell v. Railway, 51 Mich. 236, 16 N. W. 388. Where a railroad train, after the announcement of the station, is brought to a standstill in a deep cut in broad daylight, a passenger is not justified in assuming that the train has reached the station. Smith v. Railway Co., 88 Ala. 538, 7 South. 119.

an invitation to alight. Calling out the name of a station does not alone constitute an invitation. "Calling out the name of a station is an announcement by the railway officers that the train is approaching, or has arrived at, the platform, and that the passenger may get out when the train stops at the platform, or under circumstances induced and caused by the company, in which the man reasonably supposes he is getting out at the place where the company intended him to alight." [10] So the act of a brakeman in calling the station, and fastening back the car door, is not, as matter of law, an invitation to alight, but is simply an announcement that the train is near the station, and will presently stop, so as to enable passengers intending to alight there to do so when the train stops.[11]

On the other hand, the mere stoppage of the train, without announcing the station, does not always authorize a passenger, who believes himself near his destination, in leaving the train. If the stoppage is at a regular station, it is an invitation to the passenger to alight, though the station is not announced.[12] But it

[10] Bridges v. Railway Co., L. R. 7 H. L. 224.

[11] England v. Railroad Co., 153 Mass. 490, 27 N. E. 1.

[12] Raub v. Railway Co., 103 Cal. 473, 37 Pac. 374. It is negligence, as matter of law, for a railroad company to stop its train for half an hour in the nighttime, over an open ditch, six or eight feet deep, with no stationary lights there, such place being a usual stopping place for the train; and a passenger who falls into the ditch on leaving the car may recover from the company. Montgomery & W. P. R. Co. v. Boring, 51 Ga. 582. Where a passenger on a dummy line is carried past the street crossing which is his destination and ordinary stopping place to the next crossing, where the train comes to a full stop, it is proper to submit to the jury the question whether

is different if the stop is made at a place not a station. "It cannot be successfully claimed that it is the duty of those in charge of a train to warn passengers not to attempt to leave a train when it is not at a station, unless they have said or done something calculated to lead passengers to think they have arrived at the station. In the running of trains of cars, exigencies frequently arise requiring them to come to a halt at a point when not at stations. It is incumbent on the passengers to be vigilant and attentive, and not to attempt to alight until they are in some way informed that their train has arrived at the station."[13] The stopping of a train at night at a point not a station, to allow a train expected from the opposite direction to pass by, without any notice given by the servants of the company to passengers that they may leave the cars, constitutes no invitation to passengers to alight; and one who leaves the cars, and walks into an open cattle guard, cannot recover for injuries sustained.[14]

this is an implied invitation by those in charge of the train for him to get off at that point. Gadsden & A. U. Ry. Co. v. Causler, 97 Ala. 235, 12 South. 439.

[13] Davis v. Railroad Co., 64 Hun, 492, 19 N. Y. Supp. 516. In this case a train stopped near a station on a dark night, before crossing the tracks of another road. A passenger, thinking the train was at the station, stepped off, fell through a trestle, and was drowned. The station had not been announced, nor, on the other hand, had passengers been warned not to alight, though the stop was for about five minutes. Held, that defendant had not been guilty of negligence.

[14] Frost v. Railroad Co., 10 Allen (Mass.) 387. Where a train stops in the night upon a bridge over a stream to take water, it not being a stopping place for passengers to get on and off, no duty rests on the company to notify passengers not to get off the cars,

So the mere fact that, when a train leaves a station, the brakeman announces the name of the next station, does not put the company under any obligation to guard against an exodus of passengers when the train stops at an intervening railroad crossing. It has a right to expect that its passengers will sit in the cars until stations are called, as is the common custom of railroads, or, if they do not, that they will inform themselves in relation to their whereabouts.[15]

Another close question on this subject is this: Is it sufficient for the passenger to show that an announcement of the station was made, or must he go further, and show that it was made by the carrier's servants? The supreme court of the District of Columbia has held that the mere fact that a station has been announced in the train does not raise the presumption that it was done by one of the company's servants; and hence that this fact alone does not render the company liable for the death of a passenger, who leaves the train while it stops momentarily before reaching the station platform, even though the announcement was not countermanded by the company's employés.[16] The supreme judicial court of

and a failure so to do is not negligence. Illinois Cent. R. Co. v. Green, 81 Ill. 19.

[15] Minock v. Railway Co., 97 Mich. 425, 56 N. W. 780. An announcement by a brakeman, on the train leaving a station, of the name of the next station, is not an invitation for a passenger to that station to leave the train at the next stop, without further notice; and it is not negligence to stop the train before reaching the station, without warning passengers not to get off. Ward v. Railway Co., 165 Ill. 462, 46 N. E. 365.

[16] Pabst v. Railroad Co., 2 MacArthur, 42.

Massachusetts has, however, with better reason, reached a different conclusion. Evidence of the announcement of a station, when the train reaches a city, and before it stops, whether the announcement was made by a railroad man, or by any other person, is competent both on the question whether a passenger's conduct in leaving the train while making a temporary stop, before reaching the station platform, was careful, and upon the question whether defendant's servants used due care to prevent her from attempting to leave the train at a time when it was not stopped to deliver passengers. A passenger hearing such an announcement cannot be presumed to know that it was not made on authority of the carrier; and, if she does not know that the announcement is unauthorized, she is justified in alighting when the train stops. So, too, if, as a train is about to make a temporary stop at a station, before reaching a station platform, to keep out of the way of another train, an unauthorized announcement of the station is made by some third person, accompanied by a direction to "change" for another station, it is a question for the jury whether the fact that such a call has been publicly made does not impose on the carrier the duty to give a counter warning that passengers are not yet to leave the train, and whether it is negligence on the part of the carrier to suffer a passenger to get upon the platform, without warning, for the purpose of leaving the train.[17]

[17] Floytrup v. Railroad, 163 Mass. 152, 39 N. E. 797; England v. Railroad Co., 153 Mass. 490, 492, 27 N. E. 1.

§ 59. SAME—FAILURE TO BRING TRAIN UP TO PLATFORM.

The question whether or not there has been an invitation to alight is quite important in those cases where a passenger is injured in alighting, by reason of the fact that the train has not been properly drawn up at the station platform. The principle governing the English cases is thus stated by Cockburn, C. J.: "Bringing a railway carriage to a standstill at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without any warning of his danger, is negligence on the part of the company, which will entitle the passenger to recover for injuries sustained in alighting, in the absence of contributory negligence on his part." [1] In this case the train was brought to a standstill in such a manner that the last carriage, in which plaintiff rode, was opposite to a receding portion of the platform, and about four feet from it. The night was dark, and the place where the last carriage stopped was not lighted. There was no express invitation given plaintiff to alight, but the train had been brought to a final standstill, and did not move on again until it started on its onward journey. Plaintiff opened the carriage door, and, stepping out, fell into the space between the carriage and the platform. It was held that there was evidence of negligence on the part of defendant's servants to go

§ 59. [1] Cockle v. Railway Co., L. R. 7 C. P. 321.

to the jury. In a case decided in the house of lords,[2] the facts were as follows: A passenger train went only partially up to the main platform of a station, leaving the last two cars within a tunnel, which was not lighted. The last carriage came to a standstill opposite a heap of rubbish. A witness, who was a passenger in the next to the last carriage, heard the name of the station called, and alighted in safety. He then heard a groan, and found a passenger, who had been riding in the last carriage, lying on the rubbish, with his leg broken, and other injuries, of which he died. The witness heard a warning, "Keep your seats," after he had alighted, and the train moved on after he discovered the injured passenger. It was held that there was sufficient evidence of negligence to take the case to the jury, and that it was error to enter a nonsuit.[3]

[2] Bridges v. Railway Co., L. R. 7 H. L. 213.

[3] The following is a summary of some of the other English cases on this subject: A long train was stopped at a platform, so that part of it was alongside the parapet of a bridge. In the dark, a passenger, after the train had stopped, and defendant's servants had called out the name of the station, stepped upon the parapet, believing it to be the platform, and fell over. Held, in an action for the injuries sustained in the fall, that the judge was right in submitting to the jury the question whether the circumstances amounted to an invitation to plaintiff to alight, and that there was evidence of negligence on defendant's part which justified a verdict in plaintiff's favor. Whittaker v. Railway Co., 22 Law T. (N. S.) 545. A porter called out the name of a station, the engine driver overshot the station platform, and the train came to a standstill. A passenger, hearing carriage doors opening and shutting, and seeing a person alight from the next carriage, stepped out of the carriage, and was injured in a fall on the embankment. It was night, and there was no light near the spot, and no caution was given. Held, that the passenger had a right to assume that the train had come

A somewhat different ruling was made in the case of Lewis v. Railway Co. As a train approached a station, an official on the station platform called out the name of the station, and shortly afterwards the train came to a standstill, having overshot the station platform. A passenger proceeded to get out, but was injured because of the backing of the train to bring it to the station platform. It was held that the company was not guilty of any negligence, and that the calling out of the name of the station by the official on the platform was not an invitation to alight.[4] This case would certainly be decided differently by most of the courts of this country, and they would unquestionably permit it to go to the jury on the question of defendant's negligence.

When the injury occurs in daylight, and the passen-

to a final standstill, and that the jury was justified in finding defendant guilty of negligence. Weller v. Railway Co., L. R. 9 C. P. 126. Plaintiff, on arriving, after dark, at a station at which he was to alight, heard the name of the station called out two or three times by one of the porters. Plaintiff's carriage was drawn up at a place about 35 feet from the end of the platform. No lights were there, and plaintiff, in stepping out, fell on his head, and was injured. Held, that there was evidence of negligence on the part of defendant, which warranted the submission of the case to the jury. Gill v. Railway Co., 26 Law T. (N. S.) 945.

[4] Lewis v. Railway Co., L. R. 9 Q. B. 66. From the remarks of Blackburn, J., in this case, one would infer that English railway porters are no better elocutionists than American brakemen. He says: "Every person must have heard porters at a railway station call out something, which, if he happens to know the name of the station, he can recognize; if not, it frequently happens that the passenger cannot make out what name it is that the porters are calling out. Calling out the name of a station is not an invitation to alight."

ger is able to see the danger, the English courts also manifest great reluctance in permitting recovery for injuries sustained in alighting because of the failure of the train to be drawn up at the station platform. Thus where the front car in a long excursion train overshoots the station platform, the company is not guilty of negligence in failing to adopt special precautions in assisting passengers to alight; and one of them, who sprains her knee in jumping from an iron step of the carriage to the ground three feet below, without using an iron footboard between the iron step and the ground, cannot recover for the injury.[5] The Irish courts seem to be more liberal than the English courts in this respect. In Nicholls v. Railway Co. the facts were as follows: Part of a railway train, including plaintiff's carriage, overshot the platform in daylight. A porter called out the name of the station, and let out some of the passengers, who were departing from the station. A reasonable time for backing the train had elapsed, and there was apparently no intention to back it, and there was at hand no servant

[5] Siner v. Railway Co., L. R. 3 Exch. 150, L. R. 4 Exch. 117. This case was distinguished and doubted in Robson v. Railway Co., 2 Q. B. Div. 87, 89. A station platform was of sufficient length to accommodate all ordinary traffic. A passenger, in alighting in broad daylight from a carriage which was beyond the platform because of the extraordinary length of the train, sustained injuries by the slipping of her foot from the step of the carriage. Held, that the place where plaintiff was required to alight being a safe place, and the cause of the accident being the slipping of her foot, which would equally have happened if her carriage had been opposite the platform, there was no evidence of negligence for the jury. Owen v. Railway Co., 46 Law J. (Q. B.) 486.

of the company whom plaintiff could request to have the train backed. Plaintiff, while cautiously attempting to alight, fell, and was injured. It was held that there was sufficient evidence of negligence to go to the jury.[6]

The principle governing the American courts in this class of cases is stated thus: It is the duty of a railway company to afford passengers reasonable facilities in alighting from the cars, both by a reasonably safe platform, and by stopping the train in such a manner that they may avail themselves of it, without unnecessary exposure.[7] The stopping of a railroad train at a station in such a manner that the rear end of a car is not at a platform, and at a place where it is not light enough for passengers to alight in safety, warrants the jury in finding the company negligent, though the front end of the car is at the station.[8] Where a train pulls up at a platform, so that nothing but the forward end of the smoking car is at the platform, passengers in the rear cars, especially ladies, are not bound to go through the smoker to alight; and

[6] Nicholls v. Railway Co., Ir. R. 7 C. L. 40. A long excursion train was stopped so as to leave several carriages beyond the platform. A female passenger in one of these carriages, after waiting some time for assistance, descended from the carriage by herself, and was injured. It was held that the arrival of the train at the end of its journey, together with the fact that the officers of the company were letting passengers out, was evidence of an invitation to alight; and that evidence that the station master saw plaintiff when about to alight from the carriage, without warning her of the danger, was sufficient to take the case to the jury. Thompson v. Railway Co., Ir. R. 5 C. L. 517.

[7] Delamatyr v. Railroad Co., 24 Wis. 578.

[8] McDonald v. Railroad Co., 88 Iowa, 345, 55 N. W. 102.

if, in consequence of the position of the train, they are injured in getting off the car in which they have been riding, it is the fault of the company.[9] Where a train overshoots its usual stopping place, but not the station platform, it is a question for the jury whether it is negligence to back it to the usual stopping place, without ascertaining whether there are passengers attempting to alight, and without warning them of the start.[10]

§ 60. SAME—PERSONAL ASSISTANCE.

A railroad company is under no obligation to furnish an able-bodied passenger personal assistance in getting on or off a train properly drawn up at a station platform; but if the train is stopped at a dangerous place, or the passenger is under a physical disability, the duty to furnish personal assistance arises. The cases on this subject are not altogether harmonious, and those where the duty has been held not to exist will be first considered. In an early Wisconsin case it was said that a railroad company is not bound

[9] Cartwright v. Railway Co., 52 Mich. 606, 18 N. W. 380.

[10] Sherwood v. Railway Co., 82 Mich. 374, 46 N. W. 773. See, also, Taber v. Railroad Co., 71 N. Y. 489, 4 Hun, 765. The car on which plaintiff was a passenger ran past the station platform, and into a tunnel, where she could not alight on the side of the car that the platform was on. Just as she was about to alight on the opposite side, the train started suddenly, and she was thrown to the ground. Held, that defendant was negligent in failing to provide a safe alighting place, and also in failing to stop the car a reasonable length of time. Onderdonk v. Railway Co., 74 Hun, 42, 26 N. Y. Supp. 310.

to furnish passengers personal assistance in getting on and off at stations, or to station employés there to warn passengers against boarding moving trains, or to give general information about getting on board.[1] So, where access to a train at a station is easy, personal assistance from the carrier's employés cannot be required by passengers as matter of right.[2] Where a railroad company has provided suitable and safe means for entering and alighting from its trains, and where it has stopped its train in a proper position to enable passengers to avail themselves of these means in entering and alighting, it is not bound to render a female passenger, accompanied by two small children, personal assistance in alighting.[3] The same principle applies to street cars. Where a street car stops for passengers to alight, if there is a rush of passengers to get off, crowding and jostling each other, it may be the duty of the conductor to use reasonable efforts to check it, to the end that passengers may not be injured or unnecessarily interfered with in their getting off; but it is not his duty to assist specially any one of the well, able-bodied passengers, unless he sees that one to be in special danger, or in some measure unable to take care of himself.[4]

§ 60. [1] Detroit & M. R. Co. v. Curtis (1868) 23 Wis. 152.

[2] Yarnell v. Railway Co., 113 Mo. 570, 21 S. W. 1.

[3] Raben v. Railway Co., 74 Iowa, 732, 34 N. W. 621.

[4] Jarmy v. Railway Co., 55 Minn. 271, 56 N. W. 813. A street-railway company is not liable for injuries to a passenger while alighting, caused by the pushing and jostling of other passengers, and by a passenger stepping on her dress, where the conductor was on the ground at the time, lifting the injured passenger's child from the car. Furgason v. Railroad Co. (Ind. App.) 44 N. E. 936.

In the following cases the duty of furnishing personal assistance was held to exist. Failure to furnish a female passenger personal assistance in alighting, after bringing the train to a standstill beyond the platform, is sufficient to take the case to the jury on the question of defendant's negligence.[5] So, in the absence of a platform at a station, the company is bound to afford other accommodations to a passenger arriving in the nighttime, or give her due assistance in descending from the carriage.[6] While a railroad company does not owe a passenger the duty of personal assistance in alighting if a safe platform has been provided, yet the failure so to do is evidence of negligence, where it requires passengers to alight by means of a stool, which may be overturned by a step on the edge.[7] And where a female passenger, not ex-

[5] Robson v. Railway Co., 2 Q. B. Div. 85; Allender v. Railroad Co., 43 Iowa, 276; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466. Where a train leaves a station before an intending passenger has time to get on board, and stops at a place where the passenger is unable to board it without assistance, and she is invited to enter the car at this place, it is the duty of the employés of the railway company to assist her in boarding the train; and the company will be liable for their negligence in performing this duty. Western & A. R. Co. v. Voils (Ga.) 26 S. E. 483.

[6] McGinney v. Railway Co., 7 Man. 151. In this case a female passenger, alighting from a train at night at a place where there was no platform, was lifted from the train by a brakeman; but she was a rather heavy person, and the weight of her body on her knee in alighting caused a recurrence of synovites,—a disease with which she had theretofore been afflicted. Held, that defendant was guilty of no negligence which would render it liable for the injury.

[7] Missouri Pac. Ry. Co. v. Wortham, 73 Tex. 25, 10 S. W. 741. Where a conductor requires a female passenger to get off a car

perienced in railroad travel, is directed by the ticket agent to get on a train standing several hundred feet from the depot platform, three tracks intervening, the question whether the company owed her the duty of assisting her to the train is one of fact for the jury.[8]

In some instances, however, the courts have gone further, and have seemingly held that it is the company's duty to furnish assistance in all cases, or, at least, that the question whether it is negligent in failing so to do is for the jury in all cases. Thus in a South Carolina case it was expressly held that it is for the jury to determine whether a conductor is guilty of negligence in failing to assist a lady passenger in alighting at her destination.[9] So, in Texas, it has been held that, since it is the duty of a railway company to exercise the highest degree of care for the safety of its passengers in alighting from its cars, it is for the jury to determine whether such care includes the duty of assisting a woman laden with bundles in alighting from the train.[10] In valuing these decisions, it should be remembered that both in

which she has boarded, and to walk to another car not drawn up at the station platform, and a brakeman jerks her up the steps of that car with such violence as to injure her back, the company is liable. International & G. N. R. Co. v. Mulliken (Tex. Civ. App.) 32 S. W. 152.

[8] Allender v. Railroad Co., 37 Iowa, 264.

[9] Simms v. Railway Co., 27 S. C. 268, 3 S. E. 301. The jury may take into consideration the failure of the conductor to assist a lady passenger to alight from a train, in connection with the other circumstances, in determining whether the railway company was negligent in furnishing proper means for her to alight. Brodie v. Railway Co. (S. C.) 24 S. E. 180.

[10] Texas & P. Ry. Co. v. Miller, 79 Tex. 78, 15 S. W. 264.

Texas and South Carolina the inference of negligence is for the jury in all cases.[11] In a Virginia case this language is used: "The care and attention which the carrier is bound to use in assisting passengers to alight from his train depends upon the necessity they are under for assistance; as, for instance, where the passenger is aged or decrepit, or a child, or a female unattended and helpless. In the present case the railway company was called upon, by every consideration of duty and humanity, to exercise the highest degree of vigilant care for the safety of the passenger. A fine snowstorm was raging. The platforms of the cars, and the steps leading therefrom, were necessarily covered with snow, and rendered dangerous, especially to an unattended female passenger, as was this one. Yet she received no assistance, no attention whatever, and was permitted to walk forth into the blinding snowstorm, and to encounter all the perils of the situation, her knowledge of which, and her capacity to avoid them, were almost as nothing compared to those of the company's servants, who were present, and charged with the duty, but did nothing to aid her in her position of peril."[12]

§ 61. SAME—MOVING TRAINS ON INTERVENING TRACKS.

It is a question for the jury whether or not a railroad company is guilty of negligence in running a train at a high rate of speed past its station, at which

[11] See ante, § 28.

[12] Alexandria & F. R. Co. v. Herndon, 87 Va. 193, 12 S. E. 289.

another train is receiving and discharging passengers, who are compelled to cross the track of the moving train in going to and from the station.[1] It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction while passenger trains stop at a station to receive and deliver passengers.[2] Failing in this, its employés should at least give ample warning of the approaching train.[3] The running of a railroad train at a high rate of speed, at an unusual hour, and without warning, past a train standing at a platform, discharging its passengers, who, to reach their destination, must cross the track of the moving train, is negligence.[4]

§ 61. [1] Tubbs v. Railroad Co. (Mich.) 64 N. W. 1061; Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201. As to contributory negligence of passengers in crossing tracks in front of moving trains, see post, §§ 136–139.

[2] Terry v. Jewett, 78 N. Y. 338, affirming 17 Hun (N. Y.) 395.

[3] Denver & R. G. R. Co. v. Hodgson, 18 Colo. 117, 31 Pac. 954.

[4] Robostelli v. Railroad Co., 33 Fed. 796. To the same effect, see Armstrong v. Railroad Co., 66 Barb. 437, affirmed in 64 N. Y. 635; Hirsch v. Railroad Co., 53 Hun, 633, 6 N. Y. Supp. 162; Gonzales v. Railroad Co. (1870) 39 How. Prac. (N. Y.) 407, reversing 1 Sweeny (N. Y.) 506; Chicago, B. & Q. R. Co. v. Czaja, 59 Ill. App. 21; Dallas & O. C. Ry. Co. v. Reeman (Tex. Civ. App.) 32 S. W. 45. The question whether a railroad company is guilty of negligence in kicking a freight car, detached from the engine, in front of its passenger depot while passengers are in waiting there, so that it strikes a passenger crossing the track on his way to the train, is one of fact for the jury. Hempenstall v. Railroad Co., 82 Hun, 285, 31 N. Y. Supp. 479. The same principle has been applied to street cars. At the junction of a cable and an electric street railway, the accumulated snow had been banked by the company to the height of four or five feet along the tracks, and passengers who were trans-

So, to run a train at a speed of 25 miles an hour past a depot on a track across which passengers for a train of another railroad company have to go is negligence.[5] It is a question for the jury whether a railroad company is liable for the death of a passenger, who was lighted off the steps by the conductor while the train was still slowly moving, and who was struck by another train on a parallel track as soon as he touched the ground.[6] This principle does not, however, apply where the passengers have been discharged, and the passenger train is again in motion. A passenger got off the train on the side away from the depot, and in passing over another track was struck by the engine of another train, which was moving slowly. Neither the engineer nor the fireman saw the passenger, and he testified that he did not see the train, because the steam from the engine on his own train obstructed his vision. The train from which he alighted had already started from the depot at the time of the accident. It was held that the evidence failed to show any negli-

ferred from one car to the other were accustomed to walk along the track between the two snow walls until they reached the car they desired to take. Held, that it was negligence for the employés of the street railway to back an electric car towards the cable car, about a block away, with both conductor and motoneer on the front end of the electric car, when they both knew that passengers from the cable car were walking along the track towards their car. Cameron v. Trunk Line, 10 Wash. 507, 39 Pac. 128.

[5] Chicago, St. P. & K. C. Ry. Co. v. Ryan, 165 Ill. 88, 46 N. E. 208, affirming 62 Ill. App. 264.

[6] McDonald v. Railway Co., 127 Mo. 38, 29 S. W. 848; Lewis v. Canal Co., 145 N. Y. 508, 40 N. E. 248, affirming 80 Hun, 192, 30 N. Y. Supp. 28.

gence on defendant's part, and that it was error to submit the case to the jury.[7]

The decisions of the English courts are substantially the same as those of our own. A passenger at a station attempted to cross the rails to a platform on the opposite side by a path which the railway company had always allowed passengers to use for that purpose. While in the act of crossing, she was knocked down and killed by a train, which had been suddenly, and without any warning, driven backward along the line of rails which she was crossing. It was held that the jury was warranted in finding defendant guilty of negligence.[8] A decision of one of the Irish courts seems, however, to be somewhat at variance from our own. A passenger's train was shunted, on a dark night, in his absence, to an unusual siding, out of sight of the platform. While crossing the main line, going in the direction of the station master's office, presumably to make inquiry as to his train, the passenger was struck and killed by another train. It was held that, though there was no accommodation by a bridge for the passenger, and no servant at hand to direct him, there was no evidence of negligence which would warrant the submission of the case to the jury.[9]

[7] Goldberg v. Railroad Co., 133 N. Y. 561, 30 N. E. 597, reversing 60 Hun, 586, 15 N. Y. Supp. 579.

[8] Rogers v. Railway Co., 26 Law T. (N. S.) 879. In an action by one run over by a train while crossing a railroad track near a station on her way to take a train, the fact that the company permitted the gates at the crossing to be open, and the gate keeper to

[9] Falkiner v. Railway Co., Ir. R. 5 C. L. 213.

§ 62. SAME—EXISTENCE OF SAFE AND UNSAFE EXIT.

A railway company has not discharged its whole duty to the passenger when it has provided a safe exit from its cars, while at the same time there exists another way which is not safe, and which is in such general use by its passengers as to induce the belief that it is permitted, in part, at least, for that purpose.[1] Hence where a railroad company makes provision only on one side of its track for passengers to leave its cars, and it is dangerous to leave on the other side, it is a question for the jury whether it is negligence in the company not to have provided some means to prevent passengers from leaving on the wrong side, or to notify them not to do so.[2] A railroad company which, with full knowledge of the facts, permits a dangerous and unsafe way to be used by passengers in going to and from its stations and trains, is liable for injuries to passengers caused by defects in the way, though it has provided another way which they

be absent, is evidence of negligence. Stapley v. Railway Co., L. R. 1 Exch. 21.

§ 62. [1] Missouri Pac. Ry. Co. v. Long, 81 Tex. 253, 16 S. W. 1016.

[2] McKimble v. Railroad, 139 Mass. 542, 2 N. E. 97; Van Ostran v. Railroad Co., 35 Hun, 590. Though a railroad company has provided a safe platform by which passengers may leave the train, yet where there is also a platform on the other side which passengers have also been accustomed to use for that purpose, it is the company's duty to warn passengers alighting on that side of dangers which they may encounter by so doing, if such dangers are not apparent. Illinois Cent. R. Co. v. Davidson, 22 C. C. A. 306, 76 Fed. 517.

might have used with safety.[3] And, though the company has provided one safe and convenient way, yet if it permits the maintenance of another way by private persons, which has every indication of having been provided for the use of the public, a strange passenger, who takes the private way, and is injured by its faulty condition, may recover.[4] So the fact that a combination passenger and baggage car is furnished with a platform and steps in the rear does not release the company from liability for injuries to a passenger who left the car at the place generally used by passengers,—the side door of the baggage compartment.[5]

[3] Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. Law, 169, 19 Atl. 178; Oldright v. Railway, 22 Ont. App. 286; Longmore v. Railway Co., 19 C. B. (N. S.) 183.

[4] Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. Law, 169, 19 Atl. 178.

[5] Missouri Pac. Ry. Co. v. Long, 81 Tex. 253, 16 S. W. 1016. In this case it is said: "A railway company, it is true, is not bound to see that its passengers act in a prudent manner, or to use physical means to compel them to do so. But when its servants see that its passengers are in the habit of leaving its cars by a door not provided for that purpose, it would seem to be the duty of such servants at least to warn them that there is another door which they are expected to use." A rule of a railroad company requiring the rear door of the rear car of a passenger train to be locked while at the station is reasonable, and the company is not guilty of negligence in keeping the door locked, as to a passenger who boarded the rear end of the last car with knowledge of the rule, and who was injured by reason of his inability to enter the car. Missouri, K. & T. Ry. Co. of Texas v. Brown (Tex. Civ. App.) 39 S. W. 326. In Nicholson v. Railway Co., 3 Hurl. & C. 534, the facts were these: A railway passenger was set down after dark on the side of the train away from the station and place of egress. The train was detained more than 10 minutes at this place, and from its length blocked up the ordinary crossing to the station, which was on the

An early Pennsylvania case is, however, in conflict with these decisions. It holds that a railroad company which provides a safe platform for its passengers on one side of its train is not liable for the death of a passenger who gets off on the wrong side, and is struck by an engine on a parallel track; and the fact that passengers were accustomed to get off on the wrong side is immaterial.[6] Certainly, as applied to a passenger unacquainted with the locality, this decision is radically unsound, for how can a stranger know that he is not taking the safe way when two ways are open to him, with the character of neither of which he is acquainted? In a recent case the supreme court of Pennsylvania again held that a railroad company which has provided a safe and convenient means of ingress and egress to and from its trains, upon one side of its track, has in this particular discharged its whole duty to passengers, and is not bound to anticipate that they will alight on the opposite side; and hence a passenger who, in the nighttime, with knowledge of the facts, purposely gets off on the side having no platform, cannot recover for injuries sustained by falling into an unguarded excavation made

level. The ticket collector stood near the crossing, with a light, telling the passengers, as they delivered their tickets, to pass on. A passenger passed down the train, to cross behind it, and from the want of light stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railroad company. Held, that these facts disclosed negligence on the part of the company.

[6] Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 37 Pa. St. 420.

by the railroad company.[7] So, the court of appeals of Kentucky has recently held that when a railroad company has a platform and other facilities for entering and leaving the cars in safety on the depot side of the track, the failure to have the opposite likewise prepared as a place for entering and leaving the cars cannot be regarded as negligence. It may select and adhere to such arrangement of its depot and platform as it may see fit, if those are made safe and commodious. Nor is a railroad company required to so light the depot side of its platform as to admonish passengers that that platform is exclusively used for passengers. That would require the other side of the track to be lighted, so as to admonish the passengers that it was not used for passengers at all. All that is required is that it should be so lighted as that, by the exercise of ordinary care, the passengers can ascertain that it is the platform used for passengers. The other side, not being lighted at all, is notice that it is not so used.[8]

Of course, as to passengers acquainted with the dangerous character of the way, a warning or notice not to use it is useless, and the company is not chargeable with negligence in failing to give it. It has accordingly been held in other states that, where a railroad company has a platform and other facilities for entering and leaving its cars with safety on the depot side of the track, the failure to have the opposite side likewise prepared as a place for entering and leaving

[7] Drake v. Railroad Co., 137 Pa. St. 352, 20 Atl. 994.

[8] Louisville & N. R. Co. v. Ricketts (Ky.) 37 S. W. 952.

the cars cannot be regarded as negligence, as to a passenger who knows the facts, and who purposely leaves the train on the wrong side, to save himself a short walk.[9]

§ 63. SAME—FREIGHT TRAINS.

A railroad company may require passengers desiring to travel on one of its freight trains to enter or leave the coach at a point on the depot grounds other than the station platform, where the way between the station house and the point of embarkation is kept in proper condition.[1] It is not to be expected that there will be the same particularity in drawing a freight train up to a station as a train devoted to passenger service. The great length and weight of such trains, and the appliances necessary in their operation, render them less easy of control.[2] But when a freight train is not drawn up to a station platform, passengers are entitled to receive such care and attention as are necessary to enable them to properly reach the station; and this is especially so where the place at which they are discharged is either inappropriate or inconvenient.[3] And to stop a freight train carrying passengers, on a dark night, in such a manner that a cattle guard intervenes between the station platform

[9] Louisville & N. R. Co. v. Ricketts, 93 Ky. 116, 19 S. W. 182; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

§ 63. [1] Browne v. Railroad Co., 108 N. C. 34, 12 S. E. 958; Hemmingway v. Railway Co., 67 Wis. 668, 31 N. W. 268; Hays v. Railway Co., 51 Mo. App. 438.

[2] Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204.

[3] New York, C. & St. L. Ry. Co. v. Doane, 115 Ind. 435, 440, 17 N. E. 913.

and the caboose, is negligence, which renders the company liable for injuries sustained by a passenger on his way to the caboose, who fell into the cattle guard, of the existence of which he was ignorant.[4] Where stockmen accompanying their stock to market are required to change from one train to another, the company is bound to use reasonable care in providing them with a safe opportunity of alighting from the train in which they are, and entering the other, in which they are to continue the trip; and if they are induced by the conductor to enter a place of danger, and are injured without the want of due care on their part, the company is liable.[5]

§ 64. SAME—STREET CARS.

A street-car company, receiving and discharging passengers in the public streets, manifestly cannot be held to as strict an accountability to furnish a safe place for entering and leaving its cars as is an ordinary steam railroad, which has absolute ownership and control of its stational facilities. All that can be required of the street-railway company is that it exercise proper care in the selection of the places at which it receives and discharges passengers, and, having exercised care in this respect, it is not in legal fault if the place proves unsafe.[1] This duty to select

[4] Hartwig v. Railway Co., 49 Wis. 358, 5 N. W. 865.

[5] Chicago & A. R. Co. v. Winters, 65 Ill. App. 435.

§ 64. [1] Conway v. Railroad Co., 87 Me. 283, 32 Atl. 901, citing Middlesex R. Co. v. Wakefield, 103 Mass. 261, and Creamer v. Railway Co., 156 Mass. 320, 31 N. E. 391.

a safe landing place requires only that the place be safe for passengers who alight while the car is at rest, and not when in motion; nor does it apply to a place where the car stops because of an obstruction on the track, and not for the purpose of discharging passengers.[2] It is not negligence on the part of the servants of an electric street-car company to stop the car, in broad daylight, in the usual manner, opposite a place where the street paving has been removed, leaving an excavation about six inches deep; and a passenger who is injured in alighting, without looking to see where she is stepping, cannot recover, since, in considering the question of the negligence of defendant's servants, it must be taken that they "had a right to assume that plaintiff would look, and take heed unto her steps." [3] But it has been held that stopping a street car so that a little embankment of sod is within seven or eight inches of the running board is evidence of negligence, in an action by a passenger who was injured in stepping between the embankment and the car.[4] And unquestionably a street railroad is guilty of negligence in stopping its car in the nighttime, with the car steps protruding over an excavation in the street, without warning a passenger about to alight of the danger.[5] So it is negligence in a street-railway company to run its car past the usual stopping place, and thus compel an intending passenger to walk in

[2] Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406.

[3] Bigelow v. Railway Co., 161 Mass. 393, 37 N. E. 367.

[4] Poole v. Railway Co., 100 Mich. 379, 59 N. W. 390.

[5] Richmond City Ry. Co. v. Scott, 86 Va. 902, 11 S. E. 404.

the dark along an elevated track, without a railing, in order to reach the car.[6]

The jury may find the driver of a street car guilty of negligence in compelling a female passenger to leave the car in a crowded street, where a fire apparatus, driven rapidly on the car track in the same direction, is only 15 or 20 feet behind the car when it stops.[7] But where a passenger is thrown while attempting to board a street car, and falls on a parallel track, and is there run over by another car going in the opposite direction, the company is not liable if the driver of that car took all the measures that an ordinarily prudent man would have taken to prevent the collision.[8]

But where a street-railroad company contracts with a city, as a consideration for its franchise, to keep a portion of the streets in good order and repair, any one who suffers special damages from its breach of contract may recover against it in a direct action,—in this case, a passenger who, in stepping from a slowly-moving car, caught his foot in a hole in the crosswalk, and was thrown to the ground.[9]

[6] Vasele v. Railway Co. (Wash.) 48 Pac. 249.

[7] Maverick v. Railroad Co., 36 N. Y. 378.

[8] Pallez v. Railroad Co. (Sup.) 4 N. Y. Supp. 384, affirmed 123 N. Y. 652, 25 N. E. 954. Where a street car stops at a transfer station and passengers are invited to enter on both sides of the car, a motorman on an approaching car on a parallel track, seeing passengers enter the stationary car, is bound to exercise more care than when passing another car in motion, and particularly is this true when he knows that the company invites passengers to enter on the sides of the car near his track. Gaffney v. Railroad Co., 6 Misc. Rep. 1, 25 N. Y. Supp. 996.

[9] Ober v. Railroad Co., 44 La. Ann. 1059, 11 South. 818.

§ 65. SAME—VESSELS.

Common carriers by water, as well as by land, are bound to provide reasonably safe means of exit for passengers using due care.[1] A steamboat proprietor, who uses a gang plank only a little over two feet wide, while the gangway on the boat is over four feet wide, is bound to warn passengers leaving the boat at night, either by light or otherwise, of the narrowness and location of the gang plank.[2] A steamboat owner, who departs from the ordinary and proper method of landing his passengers, and who compels them to jump from the boat in motion, is responsible for injuries sustained by passengers in so doing.[3] It is negligence in the employés of a ferry company to order teams to pass off its ferryboat before the bridge, prepared for that purpose, is properly adjusted; and where, in consequence of such nonadjustment, a horse attached to a heavily loaded cart slips and falls, causing the cart to strike and injure a passenger, the company is liable.[4] The letting down of the chains which guard

§ 65. [1] Scanlan v. Tenney, 72 Fed. 225; Magoric v. Little, 25 Fed. 627.

[2] Scanlan v. Tenney, 72 Fed. 225. Where a stranger using a ferry after night is directed by a watchman in charge to take a certain direction, and, while following that direction, is injured, without fault of his, by a passing train, the proprietors of the ferry are liable. Magoric v. Little, 25 Fed. 627.

[3] Cameron v. Milloy, 14 U. C. C. P. 340.

[4] Hazman v. Improvement Co., 50 N. Y. 53, affirming 2 Daly (N. Y.) 130. It is negligence in the employés of a ferry company to open the doors of a crowded waiting room while heavy trucks are being driven rapidly from the boat, and the company is liable for

the passage from a ferryboat to the bridge, by one of the servants of the ferry company, before the boat is properly secured to the bridge, is an act of negligence, which will render the company liable for injuries to a passenger, who, in alighting, steps into the open space between the boat and the bridge.[5] It is negligence for a deck hand of a steamer to let go a barrel of sugar on a gang plank considerably inclined towards the shore, and the boat owners are liable for injuries to a passenger leaving the boat, who was struck by the barrel.[6]

the death of a passenger who was pushed by the waiting crowd into the vehicle roadway, and run over by a truck leaving the boat. Tonkins v. Ferry Co., 47 Hun, 562.

[5] Ferris v. Ferry Co., 36 N. Y. 312. Common carriers of passengers by a ferryboat do not perform their whole duty by making regulations forbidding passengers to leave the boat until the guard chains before the several gangways are lowered. It is their duty to enforce the rules, and they are guilty of negligence in permitting them to be habitually violated. The Manhasset, 19 Fed. 430. But the mere fact that a chain on a ferryboat, used to prevent the premature egress of passengers, has been removed before the boat reached the landing place, is not evidence of negligence on the part of the owners of the ferryboat; and they are not liable to a passenger for injuries sustained in attempting to alight in the dark, where the servant charged with the duty of removing the chain testifies, without contradiction, that he did not remove the chain, and it appears that there was a crowd of passengers on the boat, some of whom had pressed forward and left the boat ahead of plaintiff. Joy v. Winnisimmet Co., 114 Mass. 63.

[6] Julien v. The Wade Hampton, 27 La. Ann. 377.

§ 66. REASONABLE TIME TO GET ON AND OFF.

A common carrier by railroad must stop his train at stations a sufficient length of time to enable passengers to get on and off in the exercise of ordinary diligence.

The carrier's duty as to the time he must give passengers to get on and off trains has been announced in terms similar to the above in very many cases.[1] What is a reasonable length of time is generally a question for the jury,[2] but the stop may be so long or

§ 66. [1] St. Louis, I. M. & S. Ry. Co. v. Person, 49 Ark. 182, 4 S. W. 755; Little Rock & Ft. S. Ry. Co. v. Tankersley, 54 Ark. 25, 14 S. W. 1099; Carr v. Railroad Co., 98 Cal. 366, 33 Pac. 213; Atlanta & W. P. R. Co. v. Smith, 81 Ga. 620, 8 S. E. 446; Savannah, F. & W. Ry. Co. v. Watts, 82 Ga. 229, 9 S. E. 129; Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204; Toledo, W. & W. Ry. Co. v. Baddeley, 54 Ill. 19; Chicago & A. R. Co. v. Byrum, 48 Ill. App. 41; Illinois Cent. R. Co. v. Taylor, 46 Ill. App. 141; Ohio & M. Ry. Co. v. Smith, 5 Ind. App. 560, 32 N. E. 809; Jeffersonville, M. & I. R. Co. v. Parmalee, 51 Ind. 42; Lehman v. Railroad Co., 37 La. Ann. 705; Swigert v. Railroad Co., 75 Mo. 475; Richmond v. Railway Co., 49 Mo. App. 104; Murphy v. Rome, W. & O. R. Co., 56 Hun, 645, 10 N. Y. Supp. 354; Fairmount & A. St. P. Ry. Co. v. Stutler, 54 Pa. St. 375; Ft. Worth & D. C. Ry. Co. v. Viney (Tex. Civ. App.) 30 S. W. 252; Detroit & M. R. Co. v. Curtis, 23 Wis. 152; McSloop v. Railroad Co., 59 Fed. 431. A South Carolina statute requires railroad companies to entirely stop passenger trains at stations where they are advertised to stop, for a time sufficient to receive and let off passengers. Rev. St. S. C. 1893, § 1687.

[2] McSloop v. Railroad Co., 59 Fed. 431; Dickens v. Railroad Co., 1 Abb. Dec. 504, 40 N. Y. 23. Where there is a conflict in the evidence as to whether the train stopped only from 10 to 20 seconds, or whether it stopped a minute, while from 10 to 15 passengers got off, the question of defendant's negligence is for the jury. Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 18 Atl. 759.

so short as to enable the court to decide the question as matter of law. Thus the court will take judicial notice that ordinarily the stop of a passenger train for three minutes at a station, for the purpose of allowing passengers to get on or off the train, is reasonable and adequate, and if any special reason exists in a given case requiring a longer stop, such reason should be shown; otherwise a passenger who is injured by the sudden starting of the train, after such a stop, while he is attempting to leave it, cannot recover for the injuries.[3] As a general rule, however, the length of time which should be allowed depends on the number of passengers who are to leave the train, their agility, their incumbrances, and all the circumstances bearing on the particular occurrence, as shown by the evidence. A fleshy woman has a right to ride on a train, and to have a valise and parcels, and she is entitled to more time for alighting than might be required for a foot racer or a greyhound.[4]

After holding a train long enough to disembark and receive passengers exercising ordinary diligence, a conductor is not bound to ascertain whether all pas-

[3] Louisville, N. A. & C. Ry. Co. v. Costello, 9 Ind. App. 462, 36 N. E. 299. A stop of four minutes is sufficient for a passenger to leave the car, and get out of the way of the train. Louisville & N. R. Co. v. Ricketts, 93 Ky. 116, 19 S. W. 182. Code Ala. § 1157, and Pub. Gen. Laws Md. art. 23, § 179, require trains to stop at least one half minute at stations.

[4] Pierce v. Gray, 63 Ill. App. 158. Where a railroad company takes upon its train a passenger incumbered with hand baggage and parcels, it must have due regard to his condition in this respect when the time comes for him to leave the train. Killian v. Banking Co., 97 Ga. 727, 25 S. E. 384.

sengers desiring to embark are safely aboard the train, or whether those desiring to alight are safely on the ground, before starting the train.[5] A railroad company performs its duty when it stops its train a sufficient length of time to give passengers, using ordinary diligence, a reasonable time to alight. When the train is stopped for such a length of time, the train hands have a right to presume that all passengers desiring to do so have left the cars; and it is no part of their duties to make personal inspection of, or interrogate, the remaining passengers, to see whether they intend leaving the cars.[6] But, though a train has stopped at a station a reasonable length of time to enable passengers to alight, yet a conductor is guilty of negligence, if, having reason to believe that a passenger is in the act of alighting, he starts his train, without examination or inquiry, when he might do so by simply looking in the passenger's direction.[7] Nor is there any obligation upon a railroad company to keep its train waiting until passengers can leave the station platform. It is sufficient if reasonable time is given them in which to safely get off the train, and out of the way of the cars.[8]

[5] Browne v. Railroad Co., 108 N. C. 34, 12 S. E. 958; Raben v. Railway Co., 73 Iowa, 579, 35 N. W. 645.

[6] Hurt v. Railway Co., 94 Mo. 255, 7 S. W. 1; Clotworthy v. Railroad Co., 80 Mo. 220.

[7] Straus v. Railroad Co., 86 Mo. 421, 75 Mo. 185. It is the duty of a railroad company to afford a sufficient time to passengers to alight in safety by the exercise of reasonable diligence and care on their part, and it is negligence on the part of such company to

[8] Louisville & N. R. Co. v. Ricketts (Ky.) 37 S. W. 952.

§ 67. SAME—SIGNALS FOR STARTING.

On the question whether or not a railroad company is bound to signal its passengers that the train is about to start, the authorities are in conflict. The weight of authority, however, is that no such duty rests on the company as to passengers about to alight. In the absence of custom, a railroad company is not bound to signal its passengers that the train is about to start, after having stopped it, and kept it standing at the station a sufficient length of time to allow them to alight by the exercise of ordinary and reasonable diligence on their part. If, after the allowance of such time, a train moves off without giving any signal, and the passenger is then in the act of alighting, none of the employés knowing of his delay or of his exposed position, and he is injured in consequence of the movement of the train, the company is not liable for the consequences.[1] But in an early Wisconsin case it was held that, even if a passenger has had a reasonable time to alight, the company is guilty of negligence in starting the train without notice, while he is in the act of alighting.[2]

start a train when those operating it know, or by due diligence might know, that a passenger is in the act of alighting. Luse v. Railway Co. (Kan. Sup.) 46 Pac. 768.

§ 67. [1] Atlanta & W. P. R. Co. v. Dickerson, 89 Ga. 455, 15 S. E. 534; New York, C. & St. L. Ry. Co. v. Woods, 9 Ohio Cir. Ct. R. 322.

[2] Imhoff v. Railroad Co. (1868) 22 Wis. 682. In Keating v. Railroad Co., 49 N. Y. 673, affirming 3 Lans. (N. Y.) 469, it was held that to suddenly put a train in motion while passengers are getting on and off, without giving any signal, is an act of negligence.

As to passengers desiring to board the train, it seems that notice is required. Thus where an emigrant train stops at a station over night, a passenger has the right to get out of the car the next morning to take the fresh air, provided he keeps within a reasonable distance of the train; and it is negligence to start the train under these circumstances without giving some reasonable notice or warning to enable passengers to take their seats before it starts.[3] So it has been held in Georgia that the railroad company must use ordinary diligence to notify tardy passengers that the train is about to start.[4] In Texas it has been held that, where a train has stopped a reasonable length of time at a station, the failure to give a signal, by whistle or otherwise, of the intention to start, is not negligence per se, but the question is one of fact for

Statutes requiring signals at stations and crossings do not apply in favor of passengers on the train, and the failure to give such a signal as the train is about to leave the station is not negligence in respect to a passenger on the car. Malcom v. Railroad Co., 106 N. C. 63, 11 S. E. 187.

[3] Andrist v. Railroad Co., 30 Fed. 345.

[4] Central R. & B. Co. v. Perry, 58 Ga. 461. It is the duty of a railroad company, through its agents, to give reasonable signals of the departure of its trains from its stations and depots,—such signals as would ordinarily attract the attention of passengers and those interested in the movements of the cars of the railroad company. Perry v. Railroad Co., 66 Ga. 746. If the train stop at a wood and water station, and start again in an unusually short time, or with unusual speed, or without blowing the signal whistle at all, or sufficiently long before starting to put persons on their guard, and an injury happens at the time to a passenger, any one of these facts will be sufficient evidence of negligence and mismanagement to charge the company with liability for the injuries. Mitchell v. Railroad Co., 30 Ga. 22.

the jury.[5] In New York it has been held that an elevated railroad company, professing to provide rapid transit, and making short stops at its stations, is under the duty of giving to intending passengers, for their safety, clear and intelligible signals, indicating when it had ceased to be safe or prudent to board the train.[6]

§ 68. SAME—SUDDEN MOVEMENT OF TRAIN AFTER INVITATION TO GET ON OR OFF.

Where a passenger, thinking that the train has made its final stop at a station, is injured by its sudden movement while getting on or off, the carrier's liability generally depends on the question whether there has been an implied invitation to get on or off, and on this question the principles heretofore laid down in reference to the carrier's duty to furnish a safe landing place are likewise controlling. If a train, on being brought up to a station, comes to a stop in such a manner as to induce the belief on the part of a passenger in waiting on the platform that it has stopped for the reception of passengers, it is neg-

[5] Gulf, C. & S. F. Ry. Co. v. Williams, 70 Tex. 159, 8 S. W. 78; Galveston, H. & H. R. Co. v. Cooper, 70 Tex. 67, 8 S. W. 68.

[6] McQuade v. Railway Co., 53 N. Y. Super. Ct. 91. The fact that the conductor of a stationary elevated car has his hand raised on the bell rope, in view of a passenger about to get on board, is not an intelligible signal that it is too late for him to get on board, or that the conductor would not wait until the few seconds had elapsed during which the passenger's entry on the platform could have been safely completed, or that the conductor, regardless of plaintiff's effort to get on board, would endeavor to shut the gates against him. Id.

ligence on the part of the company to start the train when the passenger, acting on this belief, is going on board; and this is so without regard to the question whether the starting was one of necessity, or whether the stop was an actual or only an apparent one.[1] The conductor of a railway train has control of its movements, and represents the corporation, and persons boarding a car with his consent, before the train moves, have a right to rely on his assurance that it is safe to undertake to do so.[2]

The same principles apply as to passengers about to alight. Where the name of a station has been announced, and the train has come to a stop, it is the duty of the company not to start or move forward the train in an improper or dangerous manner at a time when passengers may rightfully, in the exercise of due care and caution, arise from their seats, and prepare to leave the train.[3] After announcing the name of a

§ 68. [1] Curtis v. Railroad Co., 27 Wis. 158. Where a train comes to a full stop, and the conductor cries "All aboard," and a passenger, who then proceeds to get on board, is injured by a sudden jerk of the train, the question of defendant's negligence is for the jury. Cook v. Railroad Co., 65 Hun, 619, 19 N. Y. Supp. 648.

[2] Olson v. Railroad Co., 45 Minn. 536, 48 N. W. 445.

[3] Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 273, 33 N. E. 204; Id., 46 Ill. App. 157; McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631; Id., 31 Ill. App. 100. Where a locomotive whistle is sounded, and the brakeman then calls out the name of a station, and the tram comes to a stop, a passenger for that station, unacquainted with the surroundings, and the night being dark, is justified in proceeding to get off, and may recover for injuries sustained in being thrown from the train by its sudden starting; the stop being temporary, and the station not reached. Hooks v. Railway Co., 73 Miss. 145, 18 South. 925; Southern Kan. Ry. Co. v. Pavey, 48 Kan. 452, 29

station, if the train is run so slow as to appear to a person of ordinary intelligence and observation to have stopped, ordinary care for the safety of passengers requires the train to be so run and managed as not to endanger their lives; and a sudden jerk or start, without any warning, when the passengers are upon their feet, is sufficient evidence of carelessness to impose liability on the company.[4]

Pac. 593. The violent and unusual backward jerk of a car, without notice or warning to passengers, after the train had stopped at the station, and the passengers were getting ready to leave the car in the usual manner, is sufficient evidence of negligence to take the case to the jury. Emery v. Railroad Co. (N. H.) 36 Atl. 367. Running a train past a station platform, and stopping it at a place where there are no lights, inviting passengers to use haste in getting off, and the jerking of the cars as passengers are getting off, warrant a finding of negligence. Zimmerman v. Railroad Co., 14 App. Div. 562, 43 N. Y. Supp. 883.

[4] Bartholomew v. Railroad Co., 102 N. Y. 716, 7 N. E. 623. It is a question for the jury whether a railroad company is liable for injuries to a passenger caused by the sudden jerking of the car in a mixed train, while he was standing on the platform, whither he has gone after the conductor has called the name of the station. Newton v. Railroad Co., 30 N. Y. Supp. 488, 80 Hun, 491. This decision is doubtful, since a passenger on a mixed train, who goes on the platform while the train is still in motion, assumes the risk incident to the ordinary movements of the train. Where a train has almost come to a full stop at a passenger's station, and is moving slowly, it is negligence for the engineer to suddenly and violently increase its speed, thereby throwing to the ground a passenger in the act of alighting. Nance v. Railroad Co., 94 N. C. 619. On the arrival of a train at a station, a porter, before the stopping of the train, unlocked the door of plaintiff's carriage, threw it open, and said, "All out for H." Plaintiff, supposing the train to have come to a stand, began to get out, and had placed one foot on the first step for that purpose, when the brake which had been applied to stop the train was suddenly taken off, causing

§ 69. SAME—DIRECTION TO LEAVE MOVING TRAIN.

"The rule is well established that it is culpable negligence on the part of a railroad corporation for its officers to induce a passenger to leave the train while in motion, and a gross disregard of the duty it owes him not to stop the train entirely, and give the passenger ample time and opportunity to alight." [1] Similar rulings have been made in other states.[2] The St. Louis court of appeals has, however, held that an order or direction from a trainman to a passenger to alight from a moving train does not necessarily constitute negligence. Whether it does or not will depend on the attending circumstances, and may be a question for the jury.[3]

an increase of speed, and throwing her on the platform. Held negligence on the part of the company. London & N. W. Ry. Co. v. Hellawell, 26 Law T. (N. S.) 557.

§ 69. [1] Bucher v. Railroad Co., 98 N. Y. 128, 131, citing Filer v. Railroad Co., 49 N. Y. 51.

[2] Jones v. Railway Co., 42 Minn. 183, 43 N. W. 1114; Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 491, 40 Pac. 919; Georgia, R. & B. Co. v. McCurdy, 45 Ga. 288; Parker v. White, 27 N. B. 442.

[3] Wilburn v. Railway Co., 48 Mo. App. 224, 36 Mo. App. 203. The jury may find a railroad company guilty of negligence in not stopping a train at a passenger's destination, but merely slowing the speed of the train. Edgar v. Railway Co., 11 Ont. App. 452, affirming 4 Ont. 201. As to contributory negligence of passenger in leaving moving train, see post, §§ 149–155.

§ 70. SAME—SPECIFIC RULES AS TO RECEIVING AND DISCHARGING PASSENGERS.

The rule requiring a railroad company to give a passenger a reasonable time to board the train does not apply where a passenger by mistake attempts to board a wrong train 20 or 30 minutes before the advertised time for the departure of his train; and hence he cannot recover for injuries by the sudden starting of the train while attempting to get on board.[1] But a through passenger train arriving at a way station is ordinarily waiting for passengers so long as it remains there, and a person intending to take passage on such a train may presume that it is so waiting.[2] So where a passenger presents himself for passage, and attempts to get on the train before a signal to start is given, the company must give him a reasonable time to get on board; but to cast on the company this duty the passenger must present himself in due time as such, and signify his purpose to take the train.[3] The

§ 70. [1] Flint & P. M. Ry. Co. v. Stark, 38 Mich. 714.

[2] Chicago & E. I. R. Co. v. Chancellor, 60 Ill. App. 525. A passenger entered a detached passenger car standing on a side track before the brakeman in charge had arrived, and some time before the regular departure of the train. An eight year old boy unfastened the brakes, and the car, of its own momentum, ran down grade at the rate of 10 miles per hour, and plaintiff was injured. Held, that it was a question of fact for the jury whether or not the railroad company was guilty of negligence in not locking the car door, and in not securing the brakes so as to prevent an eight year old boy from opening them. Western Maryland R. Co. v. Herold, 74 Md. 510, 22 Atl. 323.

[3] Hickenbottom v. Railroad Co., 122 N. Y. 91, 25 N. E. 279. A passenger on a through train for a station at which it was not

sale of a ticket before the arrival of a train, or when it is at the station, does not give the purchaser a specific right to take that particular train, nor is the company bound to know that she is coming, and hold the train until her arrival. The company is bound to stop the train only a reasonable length of time to get on and off; and, if the passenger comes after the signal to start is given, it is not negligence, as against her, that the train starts in obedience to it.[4]

An interesting question sometimes arises where a passenger is informed by the conductor that the train will stop a certain length of time at a station, and it starts after stopping a reasonable length of time, but before the expiration of the time announced by the

scheduled to stop got off at the station beyond, and undertook to board a local train standing on the side track, for the purpose of getting back to his destination, and was injured by the sudden starting of the train. Held that, since the local train had already made its stop, and was standing on a side track away from the station, and none of its employés knew of plaintiff's attempt to get on, the company was not chargeable with negligence. Philips v. Railroad Co., 62 Hun, 233, 16 N. Y. Supp. 909; Id., 139 N. Y. 650, 35 N. E. 207.

[4] Paulitsch v. Railroad Co., 102 N. Y. 281, 6 N. E. 577, reversing 50 N. Y. Super. Ct. 241. Where a freight train stops at a place not a station, and not for the purpose of receiving passengers, and the conductor notifies people there assembled not to board the train there, but at a designated place near by, the company is not responsible to one who was injured by the starting of the train as he was attempting to board it, though he did not hear the warning, where neither the conductor nor any other person on the train was aware of his intention to board it. Under these circumstances, it could not have been the duty of the company to keep the train standing at that place, which was not a usual place for passengers to get on, so as to afford plaintiff an opportunity to board the train there. Curry v. Railroad Co., 92 Ga. 293, 18 S. E. 422.

conductor. Where a passenger about to take a train at a station is informed by the conductor that the train will stop 10 minutes, the passenger's failure to immediately board the train will not prevent a recovery for injuries sustained by the sudden starting of the train while he was boarding it before the 10 minutes had expired.[5] But a statement by a conductor to a passenger that the train will stop 5 minutes at an intermediate station does not cast on the company the duty of stopping the train there for that length of time. The contract of a railroad company with a passenger is to carry him to his point of destination. He is not expected to leave the cars at intermediate stations, and the carrier does not engage to afford him an opportunity to do so, except at the usual stopping place for refreshments.[6]

Is the railroad company bound to give the passenger a reasonable opportunity, not only to get on board the car, but also to be seated, before starting the train? On this question the supreme court of Missouri has held that a railroad company need not wait for a passenger to reach his seat before starting the train, unless there is some special reason therefor, as

[5] Texas P. Ry. Co. v. Davidson, 68 Tex. 370, 4 S. W. 636.

[6] Missouri Pac. Ry. Co. v. Foreman, 73 Tex. 311, 11 S. W. 326. But the court of civil appeals has held that where a passenger leaves a train at an intermediate station, on the conductor's assurance that it will stop for five minutes, and the conductor, with knowledge that plaintiff has left the train, starts it before the expiration of the five minutes, and before plaintiff is sufficiently near the track to board it before it is put in motion, the jury may find the company guilty of negligence. Foreman v. Railway Co., 4 Tex. Civ. App. 54, 23 S. W. 422.

in the case of a weak or lame person, and then the carrier must have notice of the fact before creating the exception.[7] The Texas courts, however, hold that a railway train should stop at its station a reasonable length of time to allow all passengers to enter the cars, and a reasonable length of time thereafter for them to be seated; and, if the train starts before the passenger has time to get a seat, the company will be liable for the injuries sustained by reason thereof.[8]

Where a passenger is directed at a station, by train hands, to pass through cars, either to reach the station platform in alighting, or to reach the proper car in getting on board, a failure to stop the cars long enough to enable the passenger to obey the direction, in the exercise of ordinary care and diligence, is negligence, which will render the company liable for injuries sustained in being jerked from the car platform by the sudden starting of the train.[9]

One who becomes a passenger on a railroad car with his wife and little ones is their guardian and protector. He has supervision of their safety, and the family group, so far as the act of debarkation from the

[7] Yarnell v. Railroad Co., 113 Mo. 570, 21 S. W. 1.

[8] Gulf, C. & S. F. Ry. Co. v. Powers, 4 Tex. Civ. App. 228, 23 S. W. 325. The train should stop a reasonable length of time to allow all passengers to enter the cars, and if, after the passengers have all entered the cars, a reasonable time has elapsed to permit them to secure seats, the carrier may start; and in such a case it is not the duty of the conductor, or of other employés, to see that all passengers are in their seats before starting the train. International & G. N. R. Co. v. Copeland, 60 Tex. 325.

[9] Smith v. Railway Co., 108 Mo. 243, 18 S. W. 971; Turner v. Railroad Co., 37 La. Ann. 648.

cars is concerned, is to be regarded, to all intents and purposes, as a unit,—an individual integer; and the same rule which accords to that family group a reasonable time to debark must, of necessity, include within it the right to take their personal belongings or baggage along with them in the act of leaving the car.[10]

The fact that a conductor does not know that a passenger intends to leave at a station where the train stops, and does not see him leaving the car, cannot furnish the company with an excuse for not giving him a reasonable time to get off, unless he was so situated as to conceal himself from observation.[11] But starting a train from a station without giving a passenger a reasonable time to alight will not render the company liable for injuries sustained in her attempt to alight, where the premature movement of the train was caused by the unauthorized act of a fellow passenger in pulling the bell cord, and signaling the engineer to start, and she knew this, and recognized the fact that it would put the train in motion.[12]

10 Hurt v. Railway Co., 94 Mo. 255, 7 S. W. 1. A passenger alighting with a basket and a package laid the package on the car platform, got off the car steps, set down her basket, turned around, and got on the car step to reach for the package, when the train started, and she was injured. Held, that the company owed her the duty of stopping the car a reasonable length of time to enable her to alight with her packages; and, there being evidence that she used all reasonable diligence in getting off, and that the train did not stop more than a minute, a verdict in her favor would not be disturbed. Simpson v. Railroad Co., 48 Hun, 113.

11 McDonald v. Railroad Co., 116 N. Y. 546, 22 N. E. 1068.

12 Mississippi & T. R. Co. v. Harrison, 66 Miss. 419, 6 South. 319.

§ 71. SAME—FREIGHT TRAINS.

The conductor of a freight train carrying passengers should notify them of the place to get off, if it does not stop at either the freight or the passenger station, and then afford them a reasonable opportunity to get off.[1] But it is the duty of a passenger to ascertain whether a through freight train on which he embarks will stop at his destination; and, though the conductor has taken up his ticket, the conductor's refusal to stop the train is not such negligence as will render the company liable for injuries sustained by the passenger in leaping from the moving train.[2] A railroad company which has stopped its freight train at a water tank and in the station yards for about 30 minutes is not chargeable with negligence because the conductor gave the signal to leave town, so as to render it liable for injuries to a passenger who attempted to climb on a stock car before the caboose reached the station platform.[3]

§ 72. SAME—STREET CARS.

Like the ordinary steam railroad, a street-railroad company must afford passengers a reasonable opportunity to get on and off its cars.[1] But the duty of a

§ 71. [1] Reber v. Bond, 38 Fed. 822.

[2] St. Louis, I. M. & S. Ry. Co. v. Rosenberry, 45 Ark. 256.

[3] Warren v. Railway Co., 37 Kan. 408, 15 Pac. 601.

§ 72. [1] Poulin v. Railroad Co., 61 N. Y. 621, affirming 34 N. Y. Super. Ct. 296; Black v. Railroad Co., 108 N. Y. 640, 15 N. E. 389; Ferry v. Railroad Co., 118 N. Y. 497, 23 N. E. 822, affirming 54 N. Y. Super. Ct. 325. A street-car company is bound to afford a pas-

street-railroad company is more onerous in this respect than that of an ordinary railroad company. We have seen that when the train of an ordinary railroad has been brought to a standstill at the proper and usual place for receiving and discharging passengers, and remains stationary for a sufficient length of time for this purpose, the duty of the trainmen in this respect has been performed, and that they are absolved from the further duty of seeing and knowing that the passengers are on or off, as the case may be.[2] In the case of street-car companies, however, it is settled by the overwhelming weight of authority that the employés who stop the car to permit passengers to get on or off are bound to ascertain and know whether this has been accomplished before starting the car, and it is not sufficient that the car has been stopped a reasonable time.[3] This rule applies to all street-car traf-

senger a reasonable opportunity to alight with safety, and the crowded condition of a car is no excuse for lack of attention to a request of a passenger that a car stop for him to get off. West Chicago St. R. Co. v. Waniata, 68 Ill. App. 481.

[2] Ante, § 66; Highland Ave. & B. R. Co. v. Burt, 92 Ala. 291, 9 South. 410; Birmingham U. Ry. Co. v. Smith, 90 Ala. 60, 8 South. 86.

[3] Highland Ave. & B. R. Co. v. Burt, 92 Ala. 291, 9 South. 410; Birmingham U. Ry. Co. v. Smith, 90 Ala. 60, 8 South. 86; Chicago City R. Co. v. Mumford, 97 Ill. 560; Anderson v. Citizens' St. Ry. Co., 12 Ind. App. 194, 38 N. E. 1109; Britton v. Railway Co., 90 Mich. 159, 51 N. W. 276; Finn v. Railway Co., 86 Mich. 74, 48 N. W. 696; Pfeffer v. Railway Co., 24 N. Y. Supp. 490, 4 Misc. Rep. 465; Wolfkiel v. Railroad Co., 38 N. Y. 49; Cohen v. Railroad Co., 9 C. C. A. 223, 60 Fed. 698; Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 13 Sup. Ct. 557; Id., 18 D. C. 255. The fact that, while plaintiff was attempting to board one of defendant's street cars, a signal to start was given by an unauthorized person, does not exempt the railroad company from liability, if the con-

fic, whatever the motive power employed.[4] Whenever there is no regular stopping place or station for receiving or discharging passengers, and conductors are not informed in advance where passengers desire to alight, and cannot know how many are expected to alight, when the motion or signal to stop is given, the company's duty is not performed by merely stopping the car a reasonable length of time, but the conductor must inform himself, by looking and seeing, how many passengers desire and intend to alight, and, in any event, to see and know that no passenger is in the act of alighting, or in a position which would be rendered perilous by putting the car in motion. The reasonableness of this rule is apparent when we consider that the structure of street cars is such as always to make it possible, by proper precaution, to see in a moment the position of the passengers, and whether any one would be endangered by a sudden start.[5]

ductor or agent of the railway company in charge, by the exercise of due care and diligence, could have prevented the moving of the car, and thereby avoided the injury. North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958; Id., 43 Ill. App. 634.

[4] See cases cited supra. In Highland Ave. & B. R. Co. v. Burt, 92 Ala. 291, 9 South. 410, the rule was applied, though the motive power was a dummy steam engine. Where a public vehicle stops at the corner of public streets to permit passengers to alight, it is the duty of the driver, before starting the vehicle again, to look around, and see whether any one is alighting, though he has stopped for four minutes. Geirk v. Connolly, 13 Vict. Law R. 446.

[5] Cawfield v. Railroad Co., 111 N. C. 597, 16 S. E. 703. Where a street car has stopped to take on passengers, it is the duty of the conductor, before giving the signal to start, to look around, and see that all persons desiring to take passage at that place are safely on board; and failure in the performance of this duty can-

Numerous cases hold that it is negligence to start a street car with a sudden jerk, or to suddenly increase the speed of a slowly-moving car, while the passenger is in the act of getting on board,[6] or in the act of alighting,[7] or, at least, that the question is for the jury.[8]

not be excused by the fact that the conductor did not actually see a person in the act of getting on board. Dudley v. Railway Co., 73 Fed. 128. Where the signal of an intending passenger is observed by the conductor and motoneer, and the train is slowed down, and the passenger begins to board, it is incumbent on the employés of the company to know that he is on the train before they start it. Omaha St. Ry. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007. A conductor of a train of street cars, two in number, standing on the front platform of a rear car, is guilty of negligence in starting the train while a passenger is alighting from the rear platform of the front car. The conductor ought to have seen him, in the exercise of extraordinary care. Omaha & C. B. R. & B. Co. v. Levinston (Neb.) 67 N. W. 887. The rule, however, applies only to persons who attempt to get on the car while it is standing still, and not after the car is in motion. Meriwether v. Railway Co., 45 Mo. App. 528. Thus a street-railroad company is not liable for an injury to a child nearly seven years old caused by his sudden and unanticipated attempt to board a slowly-moving car, which attempt could neither be foreseen nor guarded against. Hestonville P. R. Co. v. Connell, 88 Pa. St. 520; Pitcher v. Railway, 154 Pa. St. 560, 26 Atl. 559. The driver of a street car is bound to exercise only ordinary watchfulness to observe persons in the street desiring to become passengers; and if, exercising such watchfulness, he fails to notice an intending passenger, the company is not liable for injuries sustained in an attempt to board the moving car. Lamline v. Railroad Co., 14 Daly, 144.

[6] Spearman v. Railroad Co., 57 Cal. 432; Conner v. Railway Co., 105 Ind. 62, 4 N. E. 441; Sahlgaard v. Railway Co., 48 Minn. 232, 51 N. W. 111; Butler v. Railroad Co., 49 Hun, 610, 2 N. Y. Supp. 72; Schalscha v. Railroad Co. (Sup.) 43 N. Y. Supp. 251; Thompson v. Macklem, 2 U. C. Q. B. 300. To suddenly start a street car

[7] See note 7 on following page.

[8] See note 8 on following page.

A street-car company does not fulfill its entire duty by stopping its cars merely long enough to permit a passenger to get on the platform. The conductor should see that a passenger who is lawfully entering

while a passenger, boarding it, is still on the steps, and then to jerk it, as though slackening in speed, throwing the passenger, who has sprung forward to reach a place of safety, against a seat, is evidence of negligence, sufficient to take the case to the jury. Miller v. Railway Co. (Minn.) 68 N. W. 862. Whether a car was prematurely started is a question for the jury, where the driver directed plaintiff to enter by way of the front platform, and, before she mounted the second step, the car was started, and she was thrown against the handles of the door, whereby she was injured. De Rozas v. Railway Co., 43 N. Y. Supp. 27, 13 App. Div. 296.

[7] City & S. Ry. v. Findley, 76 Ga. 311; Coast Line R. Co. v. Boston, 83 Ga. 387, 9 S. E. 1108; Wardle v. Railroad Co., 35 La. Ann. 202; Howell v. Railroad Co., 22 La. Ann. 603; Conway v. Railroad Co., 46 La. Ann. 1429, 16 South. 362; Boikens v. Railroad Co. (La.) 19 South. 737; Nichols v. Railroad Co., 38 N. Y. 131; Mulhado v. Railroad Co., 30 N. Y. 370; Munroe v. Railroad Co., 50 N. Y. Super. Ct. 114; Morrison v. Railroad Co., 130 N. Y. 166, 29 N. E. 105, affirming 8 N. Y. Supp. 436; Murphy v. Railroad Co., 43 N. Y. Supp. 223, 19 Misc. Rep. 194. It is negligence on the part of the employés on a street car to permit it to move while passengers are in the act of alighting. Martin v. Railroad Co., 38 N. Y. Supp. 220, 3 App. Div. 448.

[8] West End & A. Ry. Co. v. Mozely, 79 Ga. 463, 4 S. E. 324; Buck v. Power Co., 46 Mo. App. 555; Linch v. Traction Co., 153 Pa. St. 102, 25 Atl. 621; Crissey v. Railway Co., 75 Pa. St. 83. Whether or not the driver of a street car is negligent in starting up his team while a passenger is alighting is a question of fact for the jury, and not of law for the court. Conner v. Railroad Co. (Ind. Sup.) 45 N. E. 662. The fact that a street car is suddenly started as a passenger, in the exercise of ordinary care, is attempting to alight, after having signaled the conductor her desire to do so, does not, as matter of law, render defendant liable; the question of negligence being for the jury. Chicago City Ry. Co. v. Dinsmore, 162 Ill. 658, 44 N. E. 887, reversing 62 Ill. App. 473. It is not negli-

the cars is in a place of safety before giving the signal to the driver to proceed.[9] The company should allow passengers a reasonable time to enter and take a seat, if there be one, or reasonable time to seize the straps furnished for passengers when standing; and while it may start its car before the passenger has had time to take a seat, or secure his hold on the strap, it must exercise the utmost care in starting, so as not to jar or upset him.[10]

If a street car has been stopped at a point usual for taking on passengers, the duty devolving upon those in charge of the car, of giving ample opportunity for safely mounting, is not limited to the person or per-

gence, as matter of law, for the driver of a street car to merely slacken its speed for one to get on, especially where he, without indicating any desire that it be stopped, attempts to board it while in motion. Finkeldey v. Cable Co. (Cal.) 45 Pac. 996.

[9] Akersloot v. Railroad Co., 131 N. Y. 599, 30 N. E. 195; Dillon v. Railway Co., 49 Hun, 608, 1 N. Y. Supp. 679.

[10] Dougherty v. Railway Co., 81 Mo. 325; s. c. 9 Mo. App. 478; Holmes v. Traction Co., 153 Pa. St. 152, 25 Atl. 640; West Chicago St. Ry. Co. v. Craig, 57 Ill. App. 412; Losee v. Railroad Co., 63 Hun, 404, 18 N. Y. Supp. 297; Kinkade v. Railway Co., 29 N. Y. Supp. 747, 9 Misc. Rep. 273. It is the duty of the conductor of a street-railway car to stop it when hailed, and to hold it, and not permit it to start until the person hailing it has had a reasonable time to take a safe position inside; and a failure to perform this duty constitutes negligence. Anacostia & P. R. R. Co. v. Klein, 8 App. D. C. 75. The fact that an elevated train starts with a jerk, while a passenger, who has lingered in the choice of a seat, is in the act of sitting down, throwing her to the floor, does not show negligence in the management of the train. In the nature of things, a strong traction by the engine, involving necessarily some jerk, is inevitable in starting the train. De Soucey v. Railway Co. (Com. Pl.) 15 N. Y. Supp. 108. See, post, § 81, as to sudden jerk of car during transportation.

sons who may have signaled the car. It is their duty to stop a sufficient time for others desiring to take passage to do so safely.[11] So where a street car has stopped, or is about to stop, in obedience to the signal of an alighting passenger, another passenger who desires to alight at the same place is not bound, as matter of law, to give notice that he also desires to alight. The stopping or slowing of the car, in response to the signal, may fairly be taken as notice by all passengers that all who desire to alight may take advantage of the opportunity.[12] And though a street car stops for a purpose other than discharging passengers, yet it is negligence in the employés to start it suddenly while a

[11] Joliet St. Ry. Co. v. Duggan, 45 Ill. App. 450. The fact that a passenger rides to the end of a street-car line does not authorize a legal inference that she intends to ride back; and if the driver stops the car near the end of the track, on the return trip, at a place where passengers are in the habit of getting off, such passenger has the right to get off, without making any request or obtaining any permission; and if the driver knew it, or by the exercise of due care could have known it, it is negligence to start the car while the passenger is in the act of alighting. Chicago W. D. Ry. Co. v. Mills, 105 Ill. 63. On a former appeal in this case it was held that while a street car is passing from the office of the company to the terminus of the line,—a distance of about half a block,—the company is not required to anticipate that passengers will be desirous of getting off the cars at any and every stoppage they make on this short circuit. And therefore, unless it should appear that the driver stopped the car for the purpose of letting passengers get off, the company is not chargeable with negligence because of his starting the car forward while the passenger is alighting. Chicago W. D. Ry. Co. v. Mills, 91 Ill. 39.

[12] Rathbone v. Railroad Co., 13 R. I. 709; Wheaton v. Railroad Co., 36 Cal. 590.

passenger is in the act of alighting, provided they knew this fact.[13]

In applying the rule that passengers must be given a reasonable opportunity to get safely on board, regard must be had to the circumstances of each particular case; and the fact that the movements of a passenger are somewhat incumbered by packages in his hands may reasonably require more delay and care in starting the train, in order to insure his safety.[14]

[13] Jackson v. Railway Co., 118 Mo. 199, 223, 24 S. W. 192. In Patterson v. Railway Co., 90 Iowa, 247, 57 N. W. 880, it was further held that, in such a case, it is negligence to start the car if the employés could, by the exercise of due diligence, have known that the passenger was in the act of alighting. Where a street car has been slowed down to let a passenger get off near a street crossing, and the driver sees him on the step preparing to get off, it is negligence for the driver to release the brake and start the horses, causing a jerk, throwing the passenger to the ground, though the car is between the cross walks of an intersecting street, and the cars are prohibited to stop there by ordinance. The driver is bound to use at least ordinary care in starting the horses forward. Medler v. Railway Co., 12 N. Y. Supp. 930. Where one hails a street car while it is crossing the track of an intersecting road, the conductor and driver have a right to assume that he desires the car stopped to enable him to get on, and that he does not intend to get on while it is in motion, before the intersecting track is crossed. Even if they believe that he entertains the idea of getting on the car while it is in motion, and they should doubt his ability to do so, they owe him no such duty as to warn him off. He is the best judge of the risk of such an act, and the responsibility for it rests solely on him. Holohan v. Railroad Co., 8 Mackey (D. C.) 316.

[14] Steeg v. Railway Co., 50 Minn. 149, 52 N. W. 393. A street-car driver who knows that a passenger is about to alight, and has stooped to pick up a bundle which he has deposited on the platform, is negligent in releasing the brake, and, under the rule requiring the utmost diligence and care towards passengers, the company is liable for injuries sustained by the passenger in being struck in the

Where the only person in charge of a street car is driving on the front platform, with his back towards passengers, and a lady, without remonstrance, arises to leave the car by the rear platform while the car is in motion, it is a question for the jury whether there has been a violation of a city ordinance which requires conductors to prevent ladies or children from leaving cars while in motion.[15] So, posting printed notices forbidding passengers from riding on the front platform, or from leaving a street car while in motion, does not affect the company's responsibility for injuries to a boy caused by the driver's failure to stop the car to enable him to alight.[16] But the fact that the conductor is inside the car when it slows up at a street crossing to permit a passenger to get on board is no evidence of negligence on the part of the company.[17] A conductor is not absolutely bound to remember a notice, given him by a passenger, of the place where she intends to get off; nor is he absolutely bound, not only to stop the car at such a place, but also to give her notice that the car has stopped there, in order that she may get

eye by the brake handle. Schuler v. Railroad Co. (Com. Pl.) 20 N. Y. Supp. 683, affirming (City Ct.) 17 N. Y. Supp. 834. A street car stopped to let passengers off. Plaintiff, one of them, gathered up his tools, but before he got off, and while he was on the footboard, the car started. He requested the conductor to stop, and the latter rang the bell as a signal to stop, when plaintiff, by a jolt or jerk, was thrown off. Held, that the question of the company's negligence was for the jury. Smith v. Transit Co., 167 Pa. St. 209, 31 Atl. 557.

[15] Fortune v. Railroad Co., 10 Mo. App. 252.

[16] Brennan v. Railroad Co., 45 Conn. 284.

[17] Picard v. Railroad Co., 147 Pa. St. 195, 23 Atl. 566.

off. But the fact of notice is one circumstance to be considered, in connection with others, on the question of the conductor's negligence, and of due care on the part of the passenger.[18] Where a passenger signals the motorman to stop at the next street crossing, and the car slows up, and comes almost to a standstill on the crossing, and then the passenger gives another signal, the company is not liable for injuries sustained by reason of the sudden starting of the car, where the second signal was the usual signal to start, and the motorman did not know, and could not have known by the exercise of due care and skill, that the passenger had not alighted when he started the car.[19]

§ 73. SAME—ELEVATORS.

The person in charge of an elevator must give a passenger reasonable opportunity to obtain a balance on entering it, before a rapid and sudden upward movement is begun, having a tendency to disturb the equilibrium of one yet in motion.[1]

[18] Robinson v. Railway Co., 157 Mass. 224, 32 N. E. 1.

[19] Sirk v. Railway Co., 11 Ind. App. 680, 39 N. E. 421. Laws N. Y. 1881, c. 399, requires all elevated trains to come to a stop before passengers shall be permitted to leave them, and prohibits them from starting until every passenger desiring to depart shall have left the train, and until every passenger desiring to get on board shall have done so. This statute affords no justification for the act of a guard who closes the gate while a passenger has one foot on the car platform, and who gives the signal for starting while the passenger's foot is pinned fast by the gate. Lee v. Railway Co., 53 N. Y. Super. Ct. 260.

§ 73. [1] Mitchell v. Marker, 10 C. C. A. 306, 62 Fed. 139.

CHAPTER V.

DUTY OF CARE DURING TRANSPORTATION.

§ 74. Degree of Care.
75. Formation of Trains—Concussion of Cars.
76. Same—Position of Cars in Train.
77. Same—Street Cars.
78. Rate of Speed.
79. Same—Freight Trains.
80. Same—Street Cars.
81. Sudden Jerk of Cars.
82. Crowded Cars and Platforms.
83. Same—Street Cars.
84. Same—Stagecoaches.
85. Permitting Passenger to Ride on Platform of Street Car.
86. Vestibuled Trains and Sleeping Cars.
87. Slamming of Car Door.
88. Collisions—Between Trains Running on Same Track.
89. Same—Between Trains at Grade Crossings.
90. Same—At Street-Railway Crossings.
91. Same—Between Street Car and Vehicle.
92. Other Breaches of Carrier's Duty during Transportation.
93. Statutory Provisions against Fires and Explosives on Trains.
94. Stagecoaches.

§ 74. DEGREE OF CARE.

The rule requiring of the carrier the highest degree of care applies not only to the construction of vehicles, roadbed, and machinery, but also to the control and management of the means of transportation from the time the passenger is received as such until he is discharged at destination.[1]

§ 74. [1] Mitchell v. Marker, 10 C. C. A. 306, 62 Fed. 139; Id., 54 Fed. 637.

The foregoing is the only general principle that can be safely enounced as applicable to the rather heterogeneous class of cases, involving the carrier's duty to provide for the safety of the passenger during transportation. The mode of making up the train, the rate of speed, the jolting and jarring of cars, the crowded condition of coaches, and collisions between trains, are the principal heads under which the carrier's duty during transportation has been discussed by the courts. These subjects will be treated in this chapter, along with others of lesser importance.

§ 75. FORMATION OF TRAIN — CONCUSSION OF CARS.

If a railway company receives a passenger in one of its cars before the train is completely made up, the law requires the company to make up the train, couple, manage, and control its cars and engines, in such a careful, skillful, and prudent manner as to carry the passenger with reasonable safety; and it is liable for an injury to the passenger resulting from its neglect of this duty, if the passenger is not wanting in ordinary care.[1] A railway company, in coupling a freight train to a passenger car having passengers already on board,

§ 75. [1] Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219, 11 Ill. App. 386. A passenger who goes on a train ready to receive passengers, and who is thrown across one of the seats by the concussion of the engine with the baggage car, just as he gets inside the door, may recover for the injuries sustained, where the blow given the car was much more severe than was proper. Richmond & D. R. Co. v. Childress, 86 Ga. 85, 12 S. E. 301. Where a train has separated, leaving the rear end stationary, the question whether the engineer

is bound to exercise extraordinary diligence; that is, such diligence as very prudent persons would use with a like train under like circumstances.[2] Thus to back cars against a caboose with such force as to throw a passenger in the caboose from his seat is sufficient to warrant a jury in finding defendant guilty of negligence, where there is evidence that the cars could easily have been moved back in such a way as not to injure persons in the caboose.[3] And where a train is stopped at a station to enable passengers to get a meal, it is negligence in the employés of the company to bring a switch engine in such violent contact with a passenger car as to injure a passenger in the act of leaving the car, if he had not been allowed a reasonable time to leave after the train had stopped.[4]

is negligent in backing the front section against the rear, without giving any signal of its approach, is for the jury. Winter v. Railway Co., 80 Iowa, 443, 45 N. W. 737. Failure to apply brakes to a moving train, when the discharge of that duty will avert all danger to passengers that might result from a collision or concussion of cars, is negligence. Tillett v. Railroad Co., 118 N. C. 1031, 24 S. E. 111.

[2] Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494, 15 S. E. 848.

[3] Quackenbush v. Railway Co., 73 Iowa, 458, 35 N. W. 523; Illinois Cent. R. Co. v. Axley, 47 Ill. App. 307. Where a train is so crowded that passengers are compelled to ride on the platform, the jury is warranted in finding the company negligent in making the coupling with an unnecessarily severe jolt. Choate v. Railway Co., 67 Mo. App. 105.

[4] East Line & R. R. Ry. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834.

§ 76. SAME—POSITION OF CARS IN TRAIN.

Statutes in many states provide that, in forming a passenger train, no baggage, freight, merchandise, or lumber car shall be placed in the rear of passenger cars.[1] These statutes doubtless express the popular belief that it is safer to ride in the rear portion of a train than in the front. Even without the aid of such a statute, it has been held that to place a freight car in the rear of a passenger coach is evidence of negligence;[2] and to place broad gauge cars, constructed to run on a track four feet eight inches wide, in a train on a narrow gauge road, three feet wide, is negligence, as matter of law, which will render the company liable for a derailment caused thereby.[3]

§ 76. [1] Mansf. Dig. Ark. § 5477; Rev. St. Ind. 1894, § 5191 (Rev. St. Ind. 1881, § 3927); 1 How. Ann. St. Mich. § 3373; Rev. St. Mo. 1889, § 2607; Pen. Code Mont. 1895, § 691; Gen. St. Nev. 1885, § 881; Revision N. J. p. 933, § 116; Code N. C. 1883, § 1971; Pub. St. R. I. 1882, p. 406, c. 158, § 10; 1 Rev. St. S. C. 1893, § 1680; Sayles' Civ. St. Tex. art. 4233; 2 Comp. Laws Utah 1888, p. 32, § 2352.

[2] Philadelphia & R. R. Co. v. Anderson, 94 Pa. St. 351. In this case, a passenger train, consisting of an engine reversed, two passenger cars, and a milk car, was wrecked by running into a chasm caused by the washing out of an embankment. The engine and the two passenger cars fell into the chasm; the milk car was left standing on the track. Held, that running the engine reversed, especially at night and in a storm, and placing the milk car in the rear of the train, were circumstances from which the jury might infer negligence. Id.

[3] East Line & R. R. Ry. Co. v. Smith, 65 Tex. 167.

§ 77. SAME—STREET CARS.

A city ordinance, requiring street cars driven in the same direction to keep at least 300 feet apart, applies only to cars separately driven, and does not prohibit two street cars from being coupled together, and hauled by a single team.[1]

§ 78. RATE OF SPEED.

The mere fact that a train is run at a high rate of speed is not of itself sufficient to prove negligence on the part of the carrier. But nothing will justify or excuse running a train at a high rate of speed, when the track is known, or might, by the exercise of proper care, skill, and diligence, be known, to be in a dangerous condition. Since the speed of the train is a matter which the railway company may lawfully regulate and control, subject to the limitation that the hazard of railway travel be not thereby materially increased, it follows that even a high rate of speed, if the conditions of railway and machinery will permit it without increasing the peril of the passenger, will not be negligence.[1] But the question whether or not a rapid

§ 77. [1] Bishop v. Railroad Co., 14 R. I. 314.

§ 78. [1] Chicago, P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; Id., 48 Ill. App. 274; Indianapolis, B. & W. Ry. Co. v. Hall, 106 Ill. 371; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537. The running of a mail train at the rate of 30 or 35 miles per hour past a flag station is not negligence, so as to render the company liable for an injury resulting from the throwing of a mail bag from the postal car. Muster v. Railway Co., 61 Wis. 325, 21 N. W. 223. In determining whether a rate of speed is dangerous, the

rate of speed on a down grade around a curve is negligence is one of fact for the jury, and it is proper to refuse an instruction that no rate of speed is negligence per se.[2] And a railroad company is guilty of negligence in running a heavily overloaded train of passenger cars at such a rapid rate of speed, over a curved track and cross tracks, as to occasion a jar or jolt severe enough to throw some of the passengers down, and to jolt off one of the passengers riding on the platform.[3]

jury cannot consider whether the velocity was greater than that which had been practiced before, with the tacit consent of the community, and without accident. Cleveland, C., C. & I. Ry. Co. v. Newell, 75 Ind. 542. This case apparently overrules Ohio & M. Ry. Co. v. Selby, 47 Ind. 471, which held that, in determining whether or not a train was running at a higher rate of speed than was safe and prudent, the jury might take into consideration the rate of speed at which other trains had been run over that portion of the road, both before and after the accident. See, also, Beery v. Railway Co., 73 Wis. 197, 40 N. W. 687, where the rate of speed was held immaterial, in an action for injuries caused by the breaking of the side rods of the engine.

[2] Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 571, 9 N. E. 476. In an action for injuries sustained in the derailment of a train at a point where the road crossed a stream, and where the roadbed was in a defective condition, evidence that the character of the place was known to the engineer, and that melting snow and storm, with heavy fog, prevailed, and that the engineer had been notified of high water in the vicinity, warrants the submission to the jury of the question whether or not a speed of 20 miles per hour at that place was excessive. Andrews v. Railway Co., 86 Iowa, 677, 53 N. W. 399. But it has been held not to be negligence per se for a train to round a curve at an unusually rapid rate of speed. Chesapeake & O. Ry. Co. v. Clowes, 93 Va. 189, 24 S. E. 833.

[3] Lynn v. Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018.

§ 79. SAME—FREIGHT TRAINS.

As applied to freight trains carrying passengers, circumstances may exist which would render a speed of 40 miles an hour negligence, though the track is in good and safe condition, and the cars properly equipped and in safe condition, except as to latent defects. The train might be of unusual size, the cars improperly loaded, or loaded beyond their capacity, or there might be at the particular place danger of collision with stock, because the track was not fenced, or danger of collisions with teams at crossings, on account of the absence of warnings, or many other circumstances which would render it imprudent and unsafe to run a freight train at such a rate of speed.[1]

§ 80. SAME—STREET CARS.

The same principles which determine the liability of the ordinary railroad to its passengers for running passenger trains at a high rate of speed also apply to street railways. Thus the mere fact that a street car was going at an unusual rate of speed when derailed on a straight track in good repair does not prove negligence, unless it is shown that the rate of speed was dangerous.[1] Neither is a cable company liable for injuries to a passenger thrown from the car by a lurch while rounding a curve, where the speed causing the lurch was necessary to carry the car around the curve.[2]

§ 79. [1] Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860.

§ 80. [1] Perry v. Malarin, 107 Cal. 363, 40 Pac. 489.

[2] Hite v. Railway Co., 130 Mo. 152, 32 S. W. 33, and 31 S. W. 262.

But where a motor car, while going around a sharp curve, is run at so high a rate of speed that not only passengers standing, but those sitting, are thrown on their knees, the question of excessive speed and of the carrier's negligence is for the jury.[3] And a cable railway, in running its train at a rate of speed prohibited by ordinance, is guilty of negligence per se.[4]

The use of electricity as a motive power by passen-

[3] Francisco v. Railroad Co., 88 Hun, 464, 34 N. Y. Supp. 859. See, also, Elgin City Ry. Co. v. Wilson, 56 Ill. App. 364. A jury is warranted in finding a street-car company negligent in running a car around a curve at such a rate of speed as to throw several passengers from the platform to the ground, and to toss several others from their seats in the car. East Omaha St. R. Co. v. Godola (Neb.) 70 N. W. 491. It is negligence for a street-car driver to run the car at an unusual rate of speed in approaching a switch which he knows to be dangerous. Seelig v. Railway Co., 18 Misc. Rep. 383, 41 N. Y. Supp. 656.

[4] Weber v. Railway Co., 100 Mo. 194, 12 S. W. 804, and 13 S. W. 587. The driver of a street car left his team, and persisted in staying in the car, collecting fares and making change for passengers, after he was notified by passengers of the importance of going to his team, on account of the unusual rapidity with which they were moving. Held, in view of the fact that he was conscious of the near approach to a street where there was an abrupt down grade, that the jury was warranted in finding him guilty of negligence, and in holding the company responsible for injuries to a passenger sustained in the derailment of the car owing to its ungovernable speed. Wilkerson v. Railway Co., 26 Mo. App. 144. Where, owing to an accidental obstruction of a street-car track, a car is necessarily lifted on a parallel track, and run in the opposite direction from which cars are usually run on that track, it becomes the duty of the employés to exercise more caution to keep the car on the track than would be required were it run in the usual direction; and if the car is driven rapidly, and jumps the track, the question whether defendant is guilty of negligence is for the jury. White v. Railway Co., 61 Wis. 536, 21 N. W. 524.

ger railway companies has created new conditions, from which new duties arise. The greater speed at which cars are moved increases the danger to passengers and to persons on the streets, and of those dangers all persons must take notice. When there is an invitation or permission to passengers to ride on rear platforms, it is the duty of the company to observe a higher degree of care in the running of the cars at points where there is danger that they may be thrown off. Hence it is a question for the jury whether a street-railway company is negligent in running an electric car, the platform of which is crowded with passengers, at the rate of 15 miles an hour down grade and around a sharp curve.[5] Servants of an electric street railway are bound to know the difficulty of controlling a car when there is snow on the rails; and where, at such a time, they approach a heavy down grade at such an unusual rate of speed as to cause their car to slide down the track, though the brakes are properly set, the company is liable for injuries to a passenger.[6]

§ 81. SUDDEN JERK OF CARS.

We have seen that to start a street car with a jerk while a passenger is getting on or off is evidence of negligence.[1] A different question, however, arises when a passenger already on the car is injured by its jolting or jerking. As a general rule, a street-car com-

[5] Reber v. Traction Co. (Pa.) 36 Atl. 245.

[6] Danville Street-Car Co. v. Payne (Va.) 24 S. E. 904.

§ 81. [1] See ante, §§ 68, 72.

pany is not liable for injuries to passengers caused by starting its car in the usual and ordinary manner; but any unusual manner of starting raises a question of negligence which is for the jury.[2] The fact that the car gives a sudden movement, when started, is entirely consistent with the supposition that the horses were started in a careful and prudent manner; for a car loaded with passengers must necessarily require a strong pull of the horses to overcome the resisting inertia, and it must be a thing of constant occurrence, and unavoidable.[3] Neither is it evidence of negligence in a driver of a horse car that he whipped the horses when about to start a car full of passengers, unless there appears to be something unusual in his manner of whipping them; and a passenger who was thrown from the front platform of the car in which he

[2] Continental P. Ry. Co. v. Swain (Pa.) 13 Wkly. Notes Cas. 41. In this case it was held that where the horses drawing a crowded street car are balky, and the conductor obtains the aid of a team of eight mules, starting the car with a sudden jerk, and throwing one of the passengers, the question of defendant's negligence is for the jury.

[3] Hayes v. Railroad Co., 97 N. Y. 259. In an action for the death of a passenger who was hurled over the dashboard of the front platform, where he was standing, evidence by a fellow passenger that he experienced a jerk, as if the driver had put the brake on, and then let it off, or as if there was a rock on the track, does not show any negligence on the part of the driver in applying the brake. Bradley v. Railroad Co., 90 Hun, 419, 35 N. Y. Supp. 918. But it is negligence for a street-car driver, against warning, to drive in a trot into a trench six inches deep, excavated between the rails and along their sides by the company's employés, and it is liable for injuries to a passenger in consequences thereof. Daub v. Railroad Co., 69 Hun, 138, 23 N. Y. Supp. 268.

was riding should be nonsuited, where that is his only evidence of negligence.[4]

The same principle applies to railroad trains. An engineer, who, on arriving at a station, has shut off steam, with the intention of letting the momentum of the train carry it to its destination, is not guilty of negligence, when he finds the momentum insufficient, in letting on more than the exact quantity of steam necessary to overcome the friction of the frogs and switches, thereby creating a jerking motion of the train.[5]

§ 82. CROWDED CARS AND PLATFORMS.

The courts are divided on the question whether it is negligence, as matter of law, in a railroad company to permit a train to become so crowded that passengers,

[4] May v. Railway Co., 49 N. J. Law, 445, 9 Atl. 688, reversing 48 N. J. Law, 401, 5 Atl. 276. The mere fact that, after watering his horses, a driver of a horse car lets go the brake, and starts up the horses, as a passenger who has been riding on the steps of the front platform is about to leave to go to the rear platform, is not negligence, though the driver had, about a minute before, told the passenger to go on the rear platform. Brown v. Railway Co., 49 Mich. 153, 13 N. W. 494.

[5] Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 373. Failure of a railroad company to stop its train at a railroad crossing, as required by statute, is no breach of duty towards a passenger who desired to alight at that point; and hence a sudden increase of speed near the crossing, by means of which the passenger, while alighting, was thrown to the ground, does not render it liable, where it had no notice that he had placed himself in a position where such jerk would subject him to peril. Louisville, N. A. & C. Ry. Co. v. Johnson, 44 Ill. App. 56.

unable to obtain seats, are injured by reason of sudden jolts or jars of the train. All authorities unite in holding that it is the duty of railroad companies to furnish suitable sitting accommodations for its ordinary number of passengers, or even for an extraordinary number, on reasonable notice. One class of cases, however, holds that, where passengers apply for transportation in extraordinary or unexpected numbers, railroad companies should be held only to the exercise of such reasonable diligence in providing cars as may be consistent with the particular circumstances of each case. The fact that the company sells tickets to more passengers than it can comfortably accommodate does not render it guilty of negligence as matter of law, though doubtless greater care is required in the running and managing of the train thus crowded.[1] This view seems to have been adopted by the supreme court of the United States, which holds that the failure of a ferryboat to provide enough seats to accommodate all its passengers on a particular trip is not negligence, as matter of law, which renders it liable to a standing passenger, who was thrown to the floor by a concussion of the boat with its dock, unless it appears that a less number of seats was provided than was customary or sufficient for those who ordinarily preferred to be seated.[2] So it has been held that a passenger who voluntarily boards a crowded train, and takes his place on the platform of a car without complaint, can-

§ 82. [1] Chicago & N. W. R. Co. v. Carroll, 5 Ill. App. 201.

[2] Burton v. Ferry Co., 114 U. S. 474, 5 Sup. Ct. 960.

not assign the overcrowding of the train as negligence on the part of the railroad company.[3]

On the other hand, the New York court of appeals has held that the stoppage of a railroad train at a regular station is an invitation to the public to take passage thereon, and the sale of tickets for that train binds the company to furnish its passengers a safe and secure place in which to ride. Proof of its omission so to do, whereby the passenger is obliged to ride on the car platform, is evidence of negligence.[4] So the supreme court of Illinois has held that, where the number of passengers who have the right to take a certain train are in excess of its capacity, the railroad company must exercise the same degree of care, vigilance,

[3] Olivier v. Railroad Co., 43 La. Ann. 804, 9 South. 431.

[4] Werle v. Railroad Co., 98 N. Y. 650. It is negligence in a railroad company to allow its cars to become so crowded as to endanger the safety of those who first obtain the available room, or to permit persons to crowd upon the platform of the car in the vain hope of finding room inside. Chicago & A. R. Co. v. Dumpser, 60 Ill. App. 92. As a passenger approached an excursion train, the conductor called out, "There is lots of room inside." The passenger thereupon got on the car, but could not get inside, owing to its crowded condition, nor could he get off, because of the crowd behind, and he was compelled to ride on the front platform. He was jolted off by the crowd while the train was in motion. Held, that the question of defendant's negligence was for the jury. Dennis v. Railroad Co., 165 Pa. St. 624, 31 Atl. 52. Civ. Code Cal. § 2184, requires a common carrier of persons to provide a sufficient number of vehicles to accommodate all passengers who can be reasonably expected to require carriage at any one time. Section 2185 provides that a common carrier of persons must furnish every passenger with a seat. He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows. To the same effect, see Civ. Code Cal. §§ 483, 2102, 2103.

and forethought in providing additional cars as it is bound to exercise in its other relations to its passengers.[5]

§ 83. SAME—STREET CARS.

The exposure of a passenger to a danger which the exercise of reasonable foresight would have anticipated, and due care avoided, is negligence on the part of the carrier. Hence the question whether the employés on a street car are negligent in permitting more passengers to get on the car than can sit or stand within it, and to crowd both platforms, is one of fact for the jury, in an action for injuries to one who was crowded from the platform.[1] So it is evidence of neg-

[5] Chicago & A. R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698. In Camden & A. R. Co. v. Hoosey, 99 Pa. St. 492, it is said: "Without assenting to the broad proposition contended for, that a railroad company, using steam motive power, is bound absolutely, and under all circumstances, to provide every passenger on the train with a seat, it cannot be questioned that, as a general rule, and under ordinary circumstances, it is the duty of such company to provide suitable car accommodations and seats for those whom it undertakes to carry; and if a passenger, exercising reasonable care and prudence, is injured in consequence of the company's neglect of duty in that regard, the latter is liable to respond in damages for the injury thus occasioned solely by its own negligence." As to duty of railroad companies to furnish suitable accommodations, see post, c. 20.

§ 83. [1] Lehr v. Railroad Co., 118 N. Y. 556, 23 N. E. 889. Where cars on an elevated train are so crowded that the trainmen cannot get at the hand brakes in time to avoid a collision, the question of defendant's negligence is for the jury. Dlabola v. Railway Co. (Com. Pl.) 8 N. Y. Supp. 334, affirmed in 134 N. Y. 585, 31 N. E. 628. A street-railroad company which takes on such a large number of passengers that many are compelled to ride on the footboards is guilty of negligence in running the car so near the in-

ligence for an elevated street-car company to permit its train to become so crowded that passengers are compelled to stand on the platform, and that the gates cannot be kept closed, as required by statute.[2] So the supreme court of Nebraska has held that it is evidence of negligence on the part of a street-railroad company to carry passengers greatly in excess of the seating capacity of its cars, and to permit them to stand on the platform and steps of the cars.[3] A passenger compelled to stand on the front platform of a crowded street car may recover for injuries sustained in being thrown from the car by a jar caused by a defective track and the sudden starting of the car.[4]

But these views, though they would seem to be unquestionably sound, have not been permitted to go unchallenged. One of the circuit courts of Ohio has held that it is not negligence to crowd street cars, or the platforms of street cars. It is daily and hourly done in all places where street cars are run.[5]

tersection of a switch with the main track that the cars on the two tracks cannot pass each other without injury to the passengers on the footboards. Topeka City Ry. Co. v. Higgs, 38 Kan. 375, 16 Pac. 667.

[2] Graham v. Railway Co., 149 N. Y. 336, 43 N. E. 917, reversing 8 Misc. Rep. 305, 28 N. Y. Supp. 739.

[3] Pray v. Railway Co., 44 Neb. 167, 62 N. W. 447.

[4] Chicago City R. Co. v. Young, 62 Ill. 238.

[5] Mt. Adams & E. P. I. Ry. Co. v. Reul, 4 Ohio Cir. Ct. 362. In Chicago City R. Co. v. Considine, 50 Ill. App. 472, it is held that to permit a street car to become crowded with passengers is not negligence, as matter of law, so as to render the company liable for an injury to a passenger crowded off by the other passengers.

§ 84. SAME—STAGECOACHES.

A stagecoach proprietor is liable for an injury to a passenger from the upsetting of a coach caused by its being overloaded. To determine whether the coach was overloaded, the jury must take into consideration the number of passengers, the weight of baggage, the general character of the road, and especially the portion of it over which the coach was passing when the accident occurred.[1] To load over 400 pounds of iron on a stagesleigh resting on narrow double runners, and heavily loaded with passengers, is negligence as a matter of law, which will render the carrier liable for injuries to a passenger caused by the overturning of the sleigh on a smooth and slippery part of the road.[2]

§ 85. PERMITTING PASSENGER TO RIDE ON PLATFORM OF STREET CAR.

To permit an adult, or a person reasonably competent to care for himself, to ride on the front platform of a street car, whether crowded or not, is not negligence per se. The carrier, however, is bound to higher care and vigilance when the platform is crowded, in

§ 84. [1] Maury v. Talmadge, 2 McLean, 147, Fed. Cas. No. 9,315.

[2] Derwort v. Loomer, 21 Conn. 245. Luggage was placed on the roof of defendant's coach, without any iron railing between the luggage and the passengers. Plaintiff, an outside passenger, seated with his back to the luggage, was, by a sudden jolt, thrown from the coach, and his leg was broken. Held, that the malconstruction of the coach, and the placing of luggage in an improper position, was evidence of negligence. Curtis v. Drinkwater, 2 Barn. & Adol. 169.

proportion as that place is more dangerous than a seat inside the car; and, in the event of an injury, this fact should be considered by the jury, in connection with all the circumstances of the case, in determining the responsibility of the carrier.[1] Where a female passenger is injured while alighting from a street car because she is prevented from taking hold of the dasher by a passenger leaning against it, the jury is the proper tribunal to find whether the carrier was guilty of negligence in permitting a passenger to remain standing on the platform in such a position as to interfere with other passengers in alighting.[2]

"But in the case of a passenger who is obviously and manifestly incompetent, either from extreme youth or other cause, to exercise any proper judgment or discretion for his own safety, a somewhat larger measure of duty may be said to devolve upon the conductor of the car than under ordinary circumstances. It must be conceded, of course, that he is not held to the exercise of critical skill or judgment; for the performance of his ordinary duties, in a crowded car, may give him little opportunity to observe closely the capacity or intelligence of a particular person in his charge. He is, in this respect, held only to the exercise of that degree of discrimination which a reasonably prudent and observing man would be expected to exercise under the circumstances. His duties require him to give his attention, not only to those who may wish to board the

§ 85. [1] Sandford v. Railroad Co., 136 Pa. St. 84, 20 Atl. 799. As to contributory negligence of passenger in riding on platform, see post, § 167.

[2] Neslie v. Railroad Co., 113 Pa. St. 300, 6 Atl. 72.

car, but to those who wish to leave it, as well as to such as remain. It is his duty to collect the fares, regulate the movements of the car, and generally to conduct the affairs of the company in his charge. He may, therefore, when the car is crowded, and passengers are passing in and out, have little chance to test with accuracy the intelligence or capacity of the individual passenger, but he is bound to give his undivided attention to his business; and, if any person boards his car who is obviously incompetent to choose a place of safety, or whom he knows, or as an observing and prudent man ought to know, to be thus incompetent, it is his duty to exercise the highest degree of care and vigilance consistent with the performance of his ordinary duties for his safety." [3] It is accordingly held that to allow a boy of tender years to ride on the front platform of a street car is evidence of negligence sufficient to go to the jury.[4] And the mere fact that

[3] Sandford v. Railroad Co., 136 Pa. St. 84, 20 Atl. 799. In this case, a boy eight years old pushed through a crowded car to the front platform. He was there found by the conductor when taking up fares, and, becoming frightened by the conductor's accusation of another boy with attempting to steal a ride, he jumped from the moving car, and was injured. Held, that there was no evidence of negligence on the part of the company to go to the jury.

[4] Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906; West Philadelphia P. Ry. Co. v. Gallagher, 108 Pa. St. 524; Philadelphia C. P. Ry. Co. v. Hassard, 75 Pa. St. 367; Pittsburg, A. & M. P. Ry. Co. v. Caldwell, 74 Pa. St. 421. In this last case it was said: "It is high time that the directors of a passenger railway should understand that it is their duty, not only to make and publish rules forbidding their conductors and drivers from allowing 'children to get on and off the front platform,' or to ride there, but to see that these rules are rigidly enforced by their employés. Under no circumstances

the driver has warned the child not to ride there does not relieve the company from liability, but it is the driver's duty to compel the child to ride in a proper place in the car.[5] So it is negligence in the driver of a street car to needlessly withdraw from the front platform, leaving two boys thereon; and the company is liable for injuries to one of them, who fell from the car in a scramble engaged in by them to drive the horses.[6] But the rule that the conductor of a street car should not permit children to ride on the platform does not apply to a case where, on approaching a boy's destination, the conductor signals him to come on the platform, and says, "The next corner is yours." [7]

It is doubtful, however, whether these decisions are applicable to the modern street cars, the platforms of which are not only guarded with screens and rails, but provided with doors or gates, so as to be completely inclosed during transportation.

should they permit children to get on and off the front platform of a street car, much less to ride in a place of so much danger to life and limb. If they do, negligence is imputable to the company, and it will be held responsible for any injury occasioned thereby."

[5] East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503.

[6] Metropolitan St. R. Co. v. Moore, 83 Ga. 453, 10 S. E. 730. It is negligence in the driver of a street car to go inside to collect fares, with no one in charge of the horses, and to permit a boy nine years old to stand on the steps of the front platform while the train is so abandoned. Saare v. Railway Co., 20 Mo. App. 211.

[7] Cronan v. Railway Co., 49 La. Ann. 65, 21 South. 163.

§ 86. VESTIBULED TRAINS AND SLEEPING CARS.

The purpose of vestibuled cars is to add to the comfort, safety, and convenience of passengers, more particularly while passing from one car to another. The presence of such an appliance on a train is a proclamation by the company to the passenger that it has provided him a safe means of passing from one car to another, and is an invitation for him to use it as his convenience or necessity may require. Hence, where a railroad company runs a vestibuled train, it is a question of fact for the jury whether the company is negligent in leaving the vestibule connection without a light, and the outside door of the vestibule open, without a guard rail or other protection, while the train is running rapidly on a dark night; deceiving a passenger, who mistakes the open door for the one leading into the car, and who is thrown from the train through the open door.[1] A sleeping-car company which places a passenger in an upper berth, must furnish reasonably safe means for him to get out of it; and, where it provides electric call bells for such berths, it is negligence in the conductor or porter not to respond to a call when rung by a passenger.[2]

§ 87. SLAMMING OF CAR DOOR.

The question of the carrier's negligence when car doors slam on a passenger's hand is not free from difficulty. As a general proposition, where a passenger is

§ 86. [1] Bronson v. Oakes, 22 C. C. A. 520, 76 Fed. 734.

[2] Pullman's Palace-Car Co. v. Fielding, 62 Ill. App. 577.

injured in this manner, while entering or leaving the car, by reason of the sudden starting of the train, the question of the carrier's negligence is for the jury, on the ground that he has not allowed the passenger a reasonable time to enter or to alight. A prima facie case of negligence is made out by evidence that, while getting on board a train, a passenger's finger was mashed, as he caught hold of the door sill, by the slamming shut of the door because of the sudden starting of the train.[1] A railroad company is guilty of negligence in starting its train so violently as to cause the door to slam on the hand of a passenger, who was standing on the platform, preparatory to leaving the car.[2] Where a passenger is getting into a railway carriage at a station, and places his hand on the back of the open door to aid him in mounting the step, it is negligence for the guard, without any warning, to close the door, so as to jam his finger between the door and the door post.[3] And the fact that the door of a

§ 87. [1] Poole v. Banking Co., 89 Ga. 320, 15 S. E. 321, distinguishing Hardwick v. Banking Co., 85 Ga. 507, 11 S. E. 832.

[2] Kentucky & I. Bridge Co. v. Quinkert, 2 Ind. App. 244, 28 N. E. 338.

[3] Fordham v. Railway Co., L. R. 3 C. P. 368. L. R. 4 C. P. 619. A 12 year old boy entered a third-class railway carriage at night, and as he was seating himself he placed his finger on a part of the door. His father was behind him, getting into the carriage, when a porter violently closed the door, crushing the boy's fingers, and striking the father on the back. Held, that there was evidence of negligence on the part of the porter, which was properly submitted to the jury. Coleman v. Railway Co., 4 Hurl. & C. 699. A passenger on an elevated railroad arose as the train approached her station, and passed to the door of the car, which the brakeman held open. The jar of the train impelled her to place her hand on the

railway carriage is imperfectly fastened is evidence of negligence on the part of the company, even if the train was not in motion when the accident happened.[4]

But the rule is different after the passenger has safely entered the car. It is not negligence in the train porter to close a car door, without giving warning of the fact in advance, so as to render the company liable for injuries to a passenger, whose hand rested in the door frame. Unless there is some special reason for giving notice or warning, no principle of law requires this to be done. It is sufficient, generally, if the door of the car is open and shut with usual and proper care, in the ordinary way, without any public warning, or parade and ado over the matter.[5] A railroad company is not liable for injuries to a passenger who put his hand in the door sill to steady himself just as the door was being closed by some one who did not know of plaintiff's danger, since the company is guilty of no negligence.[6]

door casing, when, as the train stopped, the brakeman let go of the door, which slammed on her hand, injuring it. Held, that the brakeman, who had been so seated that he must have seen that plaintiff wished to get off at the station, was negligent in letting go of the door, in the absence of suitable appliances to hold it open when the train stopped. Colwell v. Railway Co., 57 Hun, 452, 10 N. Y. Supp. 636. See, also, McGlynn v. Railroad Co., 6 N. Y. St. Rep. 51.

[4] Richards v. Railway Co., 28 Law T. (N. S.) 711.

[5] Gulf, H. & S. A. Ry. Co. v. Davidson, 61 Tex. 204. A railway porter is not guilty of negligence in shutting the carriage door after a passenger has completely entered the carriage, but before he has taken his seat, and hence he cannot recover for having his thumb jammed in the hinge of the door. Maddox v. Railway Co., 38 Law T. (N. S.) 458.

[6] Ham v. Banking Co., 97 Ga. 411, 24 S. E. 152.

§ 88. COLLISIONS — BETWEEN TRAINS RUNNING ON SAME TRACK.

The principle exacting of the carrier the highest degree of care and skill applies nowhere more fittingly than in cases of collision between rapidly moving trains. As a rule, collisions do not happen unless some one has blundered, and in general the courts are disposed to hold railroad companies strictly accountable for accidents thus occurring. Where a railroad track is used by two companies, it is their duty to adopt such rules and regulations for the running of trains as will insure safety, and, having adopted them, they must conform to them, or be responsible for all consequences resulting from a departure from them. Hence it is gross negligence for one of the companies to run a train several hours out of time, when a train of the other company, going in the opposite direction, is due; and the one so running its train out of time is liable for an injury to one of its passengers sustained in a collision between the two trains.[1] A railroad company which runs its line by telegraph is bound to have a suitable telegraph line, with a proper number of operators; and in case of an accident it is for the jury to decide whether its duty in this respect was performed.[2] Where a train separates while going up a steep grade, and the rear portion, running down grade, collides with another train, the jury is warranted in finding the company negligent in permitting the two

§ 88. 1 Chicago, B. & Q. R. Co. v. George, 19 Ill. 510.

2 Grand Trunk Ry. Co. v. Walker, 154 U. S. 653, 14 Sup. Ct. 1189.

trains to run only eight minutes apart.[3] Where railroad men, running a locomotive and snow plow, know that a train is stalled on the track somewhere in the vicinity, the jury is warranted in finding them guilty of negligence in running into the stalled train, without slacking speed.[4] A terminal railway is guilty of negligence in running trains through its yards without taking any precaution against collision at a curve, except ringing bells and sounding whistles, since the adoption of a system of flagging would give almost absolute security against collisions with other trains.[5] The servants of a railroad corporation in charge of a mixed freight and passenger train are guilty of gross negligence in leaving the passenger car on the main track at a station, without using proper care to flag an approaching freight train in time to avoid collision.[6] The failure of the foreman of switch engineers to notify an engineer of the expected arrival of an excursion train, of which fact the foreman had been notified by the station master, is negligence, which will render the company liable for the death of a passenger caused by a collision between the switch engine and the train.[7] Where a freight train breaks into several parts in the nighttime, and two of the sections, without brakemen, run backward, down grade, into

[3] Louisville, N. A. & C. Ry. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869.

[4] Annas v. Railroad Co., 67 Wis. 46, 30 N. W. 282.

[5] Union Railway & Transit Co. v. Shacklet, 119 Ill. 232, 10 N. E. 896; Id., 19 Ill. App. 145.

[6] Louisville & N. R. Co. v. Long, 94 Ky. 410, 22 S. W. 747.

[7] Eddy v. Letcher, 6 C. C. A. 276, 57 Fed. 115.

the caboose, which is stationary, it is a question for the jury whether the absence of brakemen from the detached sections is negligence; one of the brakemen being in the caboose, and the other in the engine, in violation of the company's rules.[8]

But where the chain brake of a street car breaks while the car is on a down grade, and the car collides with another ahead, the driver, who remains at his post until his car is within four feet of the one in front, and who does everything possible to prevent the accident, is not chargeable with negligence, because in handling the brake he used more force than was absolutely necessary, or because he failed to shout to the driver of the forward car, at least in the absence of evidence that this would have been of service in preventing the collision.[9]

§ 89. SAME — BETWEEN TRAINS AT GRADE CROSSINGS.

Trainmen know, and are bound to know, that all points where railway lines cross at grade are places of danger, and they must, in the handling of trains intrusted to them, exercise the care which the presence of this known danger demands of them. It is negligence of the grossest kind to attempt to make a crossing without taking pains to see whether there is another train at or near the crossing, and without reducing the speed sufficiently to place the train under the

[8] Delaware, L. & W. R. Co. v. Ashley, 14 C. C. A. 368, 67 Fed. 209.

[9] Wynn v. Railroad Co., 133 N. Y. 575, 30 N. E. 721, reversing (Com. Pl.) 14 N. Y. Supp. 172.

reasonable control of the engineer; for, unless these precautions are taken, a collision is inevitable, if another train happens to be upon the crossing, even rightfully, when the other reaches it. As aids in securing the exercise of proper care on the part of trainmen, the companies place, at proper points, stopping posts upon their roads, and adopt the rule requiring all trains to be halted thereat. The mere act of stopping the train, however, is not the purpose of the rule. That is merely a means to an end. The ultimate purpose of the rule is twofold, and coincides with the requirement of the general rule of law upon the subject, to wit, to secure opportunity to those in charge of the train to ascertain whether there is another train approaching the crossing, and to place the engineer in complete control of the train.[1] Further than this, it is the duty,

§ 89. [1] Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 51 Fed. 649; s. c. 49 Fed. 209. In this case it was held that the mere fact that the train was halted near the stopping post, but at a point where the view of the crossing was obstructed, does not exonerate the train hands from negligence, if they kept no proper lookout for trains on the intersecting road approaching the crossing, and ran the train at such a rate of speed as to make it impossible for the engineer to check its movement on discovering another train on the crossing. In Grand Rapids & I. R. Co. v. Ellison, 117 Ind. 234, 20 N. E. 135, it was held that to stop an engine 700 feet from a railroad crossing, where the view of the intersecting railroad is obstructed, and then to go over the crossing, is not a compliance with Rev. St. Ind. 1881, § 2172 (Rev. St. Ind. 1894, § 2293), requiring engines to be brought to a full stop at a point near the crossing, and requiring the engineer to ascertain whether there is a train in sight or approaching on the other railroad; and hence the company is liable for injuries sustained in a collision with a train on the intersecting road. The duty to stop at crossings with intersecting railroads is quite generally imposed by statute. See

not only of the engineer, but of the fireman, when the train is in motion, and especially when nearing a crossing with an intersecting railroad, to be at his post and on the lookout; and, if a collision occurs with a train which the fireman could have discovered had he been at his post, the company is liable.[2]

A carrier is liable for an injury to a passenger sustained in a collision with a train of another railroad at an intersecting crossing, if the carrier could have avoided the collision by the exercise of that degree of care which it owed its passengers, though the employés of the other railroad may have been more grossly negligent than its own employés.[3]

Mere considerations of convenience in handling baggage and express matter do not justify a railroad company in permitting a passenger coach to stand on a crossing with another road; and the carrier is liable for the death of a passenger killed in a collision with detached freight cars, which ran down the descending grade of the other road, and struck the passenger car, where the carrier took no precaution whatever to prevent such an accident.[4] But trainmen of one road, who have complied with the statute on approaching a crossing with an intersecting road, have a right to assume that trainmen on the other road will also comply

Rev. St. Me. 1883, c. 51, § 76; 3 How. Ann. St. Mich. § 3376; Code Tenn. 1884, § 1304.

[2] Grand Rapids & I. R. Co. v. Ellison, 117 Ind. 234, 20 N. E. 135.

[3] Chicago, K. & W. R. Co. v. Ransom, 56 Kan. 559, 44 Pac. 7.

[4] Kellow v. Railroad Co., 68 Iowa, 470, 23 N. W. 740, and 27 N. W. 466.

with it, in the absence of any indication that they cannot or will not.[5]

§ 90. SAME—STREET-RAILWAY CROSSINGS.

It should be noted at the outset that, where a street railroad crosses a steam railroad at grade, the duty of the employés of the steam railroad towards passengers on the street railroad is the exercise of ordinary care, while that of the street railroad is the highest order of care.[1] It has accordingly been held that the driver of a street car, on approaching a crossing with another railroad, has no right, at the peril of the persons and lives of the passengers, to hazard the experiment of crossing the intervening track in the face of an approaching train.[2] So, while a street railroad is not bound, as matter of law, to keep a watchman at its intersection with a steam railroad, in the absence of a statute or ordinance requiring it so to do, it is a question of fact for the jury whether the absence of a watchman at such a crossing is negligence.[3] And where the safety of the passengers of a street car at a railroad crossing depends on the street-car employés' going on the railroad track to see whether trains are approaching, it is negligence for them to omit so to do.[4] Where a street-car track is intersected at a cross-

[5] Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 South. 495.

§ 90. [1] Philadelphia & R. R. Co. v. Boyer, 97 Pa. St. 91.

[2] Barret v. Railroad Co., 45 N. Y. 628, affirming 1 Sweeney, 568.

[3] Jacquin v. Cable Co., 57 Mo. App. 320.

[4] West Chicago St. R. Co. v. Martin, 47 Ill. App. 610, affirmed in 154 Ill. 523, 39 N. E. 140.

ing by several railroad tracks, and a street car is struck by an engine on the second track, it is for the jury to say whether the conductor, who had crossed the first track in advance of the car, was guilty of negligence in not crossing ahead on the second track also.[5]

Suppose, however, that a flagman is stationed at the crossing by the steam-railroad company, is the driver of the street car justified in relying on the flagman? In a Pennsylvania case, it is held that the driver of the street car is not justified in attempting to cross the track, without stopping, looking, and listening, no matter what the action of the flagman stationed at the crossing by the steam railroad may be, if the driver has information which would lead a prudent man to infer that there is danger to be apprehended from an approaching train.[6] The supreme court of Ohio has likewise held that the fact that a railroad company employs a gateman at a crossing with the tracks of a street-railway company does not excuse the failure of the employés on a street car from going ahead of the car, to ascertain whether the crossing is clear, as required by statute.[7] Even the fact that a cable car is signaled to go forward by the flagman at an intersection with an electric line does not relieve the gripman from negligence, if he could see an electric car approaching the crossing in such a manner as to render a collision imminent if he proceeded.[8] Negligence of a railroad

[5] Douglass v. Railway Co., 91 Iowa, 94, 58 N. W. 1070.

[6] Philadelphia & R. R. Co. v. Boyer, 97 Pa. St. 91.

[7] Cincinnati St. Ry. Co. v. Murray, 53 Ohio St. 570, 42 N. E. 596, affirming 9 Ohio Cir. Ct. 291.

[8] Taylor v. Railway Co. (Mo. Sup.) 39 S. W. 88.

gatekeeper in lowering the gates so as to pen a horse car on the tracks does not affect the liability of a street-railroad company to one of its passengers for its driver's negligence in going upon the track in front of an approaching train.[9] The negligent conduct of a steam railway in failing to give the statutory signals on approaching a crossing with a street railroad does not excuse the negligence of the street railroad in running its car in the way of the locomotive.[10] The fact that a street-car company violated a contract with a railroad company in failing to stop a car at a crossing with the railroad company, and in not sending forward the conductor, to see if the track was clear, is no defense to the railroad company in an action by a passenger on the street car who was injured in a collision with a train, the employés on which were also negligent.[11] The federal circuit court in Ohio has, however, held that, when a gate established by a railroad company at a street crossing is open, a street-car driver may assume that the track is clear and safe, and is not negligent in passing through the gate, without stopping to look or listen for a train.[12]

In case of collision between street cars at intersecting crossings, it is a fair question for the jury to determine whether the driver of one of the cars is guilty of negligence in approaching the crossing at a rate of

[9] Washington & G. R. Co. v. Hickey, 17 Sup. Ct. 661, affirming 5 App. D. C. 468.

[10] Hammond, W. & E. C. E. Ry. Co. v. Spyzehalski (Ind. App.) 46 N. E. 47.

[11] Baltimore & O. R. Co. v. Friel, 23 C. C. A. 77, 77 Fed. 126.

[12] Whelan v. Railroad Co., 38 Fed. 15.

speed which would not enable him to stop his car almost instantly upon discovering another car approaching on the intersecting track. And if he do approach at such a slackened rate of speed, it would also be a question for the jury whether he was not guilty of negligent conduct in attempting the experiment of crossing in front of the other car, when to remain where he was, and await its crossing, would have resulted in absolute safety.[13] And a collision between two street-railway cars on an intersecting crossing is evidence of negligence, where the driver or gripman of either car could have seen the approach of the other in time to avoid a collision by stopping his own car.[14] So the failure of a street-railroad company to provide means for informing the operatives of a car passing over a switch where two tracks unite whether another car, which should have passed that point a few minutes earlier, from the opposite direction, had done so, is negligence.[15]

§ 91. SAME—BETWEEN STREET CAR AND VEHICLE.

As to its passengers, a street-car company is bound to exercise the highest practicable degree of care to avoid collision with vehicles in the street, while as to persons in the vehicles it is bound to exercise only ordinary care. It may therefore happen that a passenger injured in a collision with a vehicle may recover under

[13] Schneider v. Railroad Co., 133 N. Y. 583, 30 N. E. 752, affirming 15 N. Y. Supp. 557.

[14] Kuttner v. Railway Co., 29 Mo. App. 502.

[15] Bailey v. Traction Co. (Wash.) 47 Pac. 241.

circumstances where the occupants in the vehicle could not.[1] The driver, whether of horses or machinery, should be vigilant in observing his track, and prompt in the exercise of every reasonable precaution to guard against danger.[2] Thus, where a motorman operating an electric car sees that the driver of a wagon on the track in front of him neither looks back, nor pays any attention to the ringing of the bell, nor increases his rate of speed, nor attempts to leave the track, it is his duty to bring his car under control, and even to stop, if necessary, to avoid a collision. His failure to do so is negligence, which will render the company liable for injuries to a passenger sustained in the collision.[3] So the question whether a gripman on a cable car is guilty of negligence in going ahead at full speed when he observes a balky team near the track, instead of stopping his car, and waiting until the team can be removed, is for the jury.[4]

A street-car company is liable for injuries to a passenger on a car who was struck, in a very narrow street, by the shaft of a wagon, where it appears that the two vehicles had stopped in plain view of each other, and that the collision could not have occurred

§ 91. [1] Sears v. Railway Co., 6 Wash. 227, 33 Pac. 389, 1081; Mt. Adams & E. P. I. Ry. Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463.

[2] Mt. Adams & E. P. I. Ry. Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463.

[3] Sears v. Railway Co., 6 Wash. 227, 33 Pac. 389, 1081.

[4] Cook v. Railroad Co., 60 Cal. 604. Where a driver of a street car keeps on when he sees that a horse attached to a truck in front has become ungovernable, and a passenger is injured in a collision with the truck, the question of the driver's negligence is for the jury. Seidlinger v. Railroad Co., 28 Hun, 505.

had the car stood still for a very short time, and permitted the wagon, which was first in motion, to get by.[5] Where a street car is driven so rapidly that the driver cannot avoid collision with a van crossing the track at midday, with no other obstruction in the street, the company is liable for injuries to a passenger in the collision.[6] Where a street-car driver urges his horses to a faster movement as a wagon on the track ahead, loaded with lumber, is turning out, causing the forward part of the car to come in contact with the projecting boards on the wagon with sufficient force to break the window and stanchion of the car, and to strike a passenger in the car, a jury is warranted in finding the driver negligent.[7]

It has even been held that a driver of a street car, who knows that passengers are riding on the running board, and who sees a truck in close proximity to the track, is bound to consider the possibility of a slight movement of the truck; and it is negligence for him to proceed at full speed, if the position of the truck is such as to apprise the motorman of the liability of a collision, even though it may be occasioned by a slight movement of the truck.[8] But the driver of a street car is not bound to be on the lookout for runaway

[5] Devlin v. Railroad Co., 57 Hun, 591, 10 N. Y. Supp. 848. A verdict for a passenger is sustained by evidence that the driver of the car drove against a wagon standing across the track, and that the collision threw plaintiff to the street, and injured him. Fox v. Railroad Co., 7 Misc. Rep. 285, 27 N. Y. Supp. 895.

[6] Franklin v. Railroad Co., 50 Hun, 605, 3 N. Y. Supp. 229, affirmed in 121 N. Y. 673, 24 N. E. 1095.

[7] O'Malley v. Railway Co., 3 App. Div. 259, 38 N. Y. Supp. 456.

[8] Wood v. Railroad Co., 5 App. Div. 492, 38 N. Y. Supp. 1077.

horses, and is not chargeable with negligence in failing to avoid a runaway horse, which was in sight only a short time before it ran into the car; the driver's attention being devoted to passengers getting on and off the car.[9]

When the car approaches a street crossing, it is the driver's duty to be on the lookout for approaching vehicles on the intersecting street, and the company is liable for injuries to a passenger in a collision which could have been avoided if the driver had been on the lookout.[10] And the rule giving to the cars of a street-railway corporation the preference and a superior right of way in the street where its tracks are laid does not apply at street crossings. At such crossings, the cars have no right superior to those of vehicles moving in the streets crossed.[11]

[9] Hamilton v. Railway Co., 163 Mass. 199, 39 N. E. 1010. But where a team approaches a street car at a crossing at such a rate of speed as to show that it is not under control, or that no reliance can be placed on the discretion of the driver, the question whether it was negligent in the driver to pass ahead of the team is a question for the jury. Watkins v. Railroad Co., 20 Hun, 237.

[10] Heucke v. Railway Co., 69 Wis. 401, 34 N. W. 243.

[11] O'Neil v. Railroad Co., 129 N. Y. 125, 29 N. E. 84, affirming 15 N. Y. Supp. 84. It is a question for the jury whether the driver of a horse car is negligent in driving rapidly on a descending grade, when he could have seen horses on a trot 60 or 70 feet away, drawing a heavy beer wagon, headed towards the track at right angles, and when he failed to check the rapid movement of the car until the collision took place. Hurley v. Brewing Co., 13 App. Div. 167, 43 N. Y. Supp. 259.

§ 92. OTHER BREACHES OF CARRIER'S DUTY DURING TRANSPORTATION.

No duty rests on a railroad company to inform or warn a passenger on a caboose car that there is danger in standing near the open side door of the car when the train is starting or in motion, since this is matter of common knowledge.[1] Nor is it the duty of the conductor of an elevated car to notify a passenger, about to pass from one car to another as the train is starting, that there will be an open space between the platforms of the two cars when they begin to move, though they are in contact while standing still.[2] But a conductor who directs a woman and a child to leave the smoking car for another more comfortable for them is guilty of negligence in failing to furnish them assistance while attempting to pass from car to car.[3] In running a train through a tunnel, requiring six or seven minutes, the failure to furnish lights, and to shut the car door, allowing smoke and cinders to enter the car, to the great inconvenience of passengers, is sufficient evidence of negligence to take the case to the jury, in an action by a passenger, who was injured in attempting to shut the door.[4] The fact that the employés of a railroad company made every effort to notify those in charge of a train of an open switch does not excuse the negligence of such employés in leaving

§ 92. 1 Thompson v. Duncan, 76 Ala. 334.

2 Clune v. Railroad Co., 48 Hun, 618, 1 N. Y. Supp. 239.

3 Cleveland, C., C. & I. R. Co. v. Manson, 30 Ohio St. 451.

4 Western Maryland R. Co. v. Stanley, 61 Md. 266.

the switch open with full knowledge of the approach of the train.[5] So it is for the jury, and not the court, to determine whether it is negligence in a railroad company to keep locked the closet in a passenger coach, leaving no place for passengers to attend to calls of nature, and to stop the coach in the nighttime over a cut 20 feet deep, with all its servants away from the coach, and without notice to passengers of the danger to which they are exposed if they attempt to get out.[6] Where a bell rope in a passenger coach fails to work, and therefore the engineer receives no signal to stop the train on a fire breaking out in the car, it is a question for the jury whether the company has complied with a statute requiring it to provide the best-known apparatus on its passenger trains for immediate communication with the engineer, and whether the failure so to do was the cause of an injury to a passenger who was burned in the fire.[7]

A street-railway company is not chargeable with negligence in permitting a passenger to place a basket between his feet, and another passenger attempting to pass over the obstruction assumes the risk and danger of so doing.[8] Where a street-car driver, attempting to drive some trespassing boys from the car, strikes at them with a stick, and, missing his aim, hits a window,

[5] Louisville & N. R. Co. v. Kingman (Ky.) 35 S. W. 264.

[6] Wood v. Railroad Co., 84 Ga. 363, 10 S. E. 967.

[7] Hay v. Railroad Co., 37 U. C. Q. B. 456. St. Vt. 1894, § 3909, requires all passenger trains to be supplied with a bell rope, connecting all passenger coaches with the locomotive hauling the train.

[8] Van Winkle v. Railroad Co., 46 Hun, 564.

and injures a passenger, the company is liable if the driver is negligent.[9]

§ 93. STATUTORY PROVISIONS AGAINST FIRES AND EXPLOSIVES ON TRAINS.

In many of the states statutes exist which prohibit the illumination of passenger cars with oil which will ignite at a temperature of less than 300 degrees Fahrenheit.[1] Still others require the heat to be generated outside and independent of the cars,[2] or compel the use of heaters in the cars that will make it practically impossible for fire to escape therefrom.[3] Still others require passenger cars to be furnished with tools, such as axes, saws, and crowbars, to enable passengers to escape from wrecked cars.[4] And in a few the transportation of explosives in passenger trains is prohibited.[5]

These statutes have rarely come before the courts for enforcement. The New York statute, prohibiting the heating of cars by any stove or furnace inside of

[9] Allen v. Railway Co., 79 Tex. 631, 15 S. W. 498.

§ 93. [1] Ky. St. 1894, § 787; Laws N. Y. 1882, c. 292; Rev. St. Ohio 1890, § 3353; 1 Rev. St. S. C. 1893, § 1683; Pub. St. R. I. p. 407, c. 158, § 16; Sanb. & B. Ann. St. Wis. § 1806.

[2] Laws N. Y. 1887, c. 616.

[3] 3 How. Ann. St. Mich. § 3434b; Pub. St. N. H. 1891, p. 453, § 13.

[4] 1 How. Ann. St. Mich. § 3433; Laws Minn. 1887, c. 18, § 2; Laws N. Y. 1884, c. 439, § 8; Sanb. & B. Ann. St. Wis. § 1807.

[5] Sanb. & B. Ann. St. Wis. § 1805; Rev. St. U. S. §§ 4278, 4279, 5353, 5355. The locking of passenger cars while the train is in motion is prohibited in some states. Rev. St. Fla. § 2266; Rev. St. Ind. § 2298; Code W. Va. 1891, p. 898, § 18; Sanb. & B. Ann. St. Wis. § 1806.

the car, has been held valid as a police regulation, even as to roads located partly without the state.[6] It has been further held that directors of the company operating the railroad are subject to the penalty imposed by the statute, if they caused the car to be heated in the prohibited manner; but that they are not liable merely because they are directors or officers of the corporation, and it must be shown that they personally participated in the offense.[7]

It has also been held that the prohibition in Rev. St. U. S. § 5353, against transporting nitroglycerine on vehicles engaged in interstate passenger traffic, extends to dynamite, which is made by mixing nitroglycerine with some solid and inert absorbent substance, and which contains no other explosive ingredient. And a freight train may be regarded as a passenger train, within the meaning of this statute, when passengers are conveyed thereby for compensation, in any kind of cars, by authority of the railway company.[8]

§ 94. STAGECOACHES.

The law pertaining to carriage of passengers by stagecoach has become yearly of less importance, as the stagecoach has been supplanted by the railroad. Mr. Justice Story, in his work on Bailments,[1] has stat-

[6] People v. New York, N. H. & H. R. Co., 55 Hun, 409, 608, 8 N. Y. Supp. 672, affirming 5 N. Y. Supp. 945, affirmed in 123 N. Y. 635, 25 N. E. 953.

[7] People v. Clark (O. & T.) 14 N. Y. Supp. 642.

[8] U. S. v. Saul, 58 Fed. 763.

§ 94. [1] Story, Bailm. (4th Ed.) §§ 592–594, 598, 600–602.

ed the law on this subject in terms of classic eloquence, traceable in many of the decisions involving railroad carriers. Indeed, it is not too much to say that the principles announced by the courts in the first few decades of the present century, governing the liability of carriers by stagecoach, have been the fruitful germs of our present voluminous law on railroad carriers. These general principles have already been noted in previous portions of this work.[2] It remains only to notice a few of the decisions peculiarly applicable to the transportation of passengers by stagecoach.

A coach owner is bound to carry the passenger from the usual place of taking up to the usual place of setting down. If the usual place for setting down passengers is the inn yard, the coach owner is liable for injuries sustained by an intended passenger from coming in contact with the arch in the gateway of the inn.[3] To leave the common track, and take one not used,[4] or to permit a passenger to drive,[5] is evidence of negligence on the part of the driver. Failure to light a stagecoach in the nighttime is evidence of negligence, in an action for injuries caused by the overturning of the coach by striking a rock in the roadway.[6]

[2] Ante, c. 1.

[3] Dudley v. Smith, 1 Camp. 167.

[4] McKinney v. Neil, 1 McLean, 540, Fed. Cas. No. 8,865.

[5] Gunn v. Dickson, 10 U. C. Q. B. 461.

[6] Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632.

CHAPTER VI.

DUTY OF CARE IN EMPLOYMENT OF SERVANTS.

§ 95. Must Furnish Careful and Competent Employés.

§ 95. MUST FURNISH CAREFUL AND COMPETENT EMPLOYES.

The carrier must exercise the highest practicable degree of care to furnish a sufficient number of careful, temperate, and competent employes, to the end that the passenger may prosecute his journey in safety.

A carrier, like any other master, is liable for the torts of his servants, while acting within the scope of their employment, without regard to the question whether he was negligent in selecting and retaining them.[1] Hence the liability of the carrier for negligence in selecting and retaining employés rarely comes before the courts for adjudication.

The law, however, compels stage-coach proprietors to furnish prudent and skillful drivers, and holds them liable for any injury that the passenger may receive on account of negligence in this respect.[2] So it is the carrier's duty to supply the coach with a driver who himself knows the way; and, in an action for injuries to the passenger from the overturning of the coach, it is no defense that the driver, the night being dark, suf-

§ 95. [1] See post, c. 25, as to carrier's liability for acts of servants.

[2] Schafer v. Gilmer, 13 Nev. 330.

fered the suggestion of the passenger to lead him off the roadway.[3] And if a regular driver substitutes one of the passengers in his place during the trip, the owners will be liable for the substitute's neglect or incompetency.[4]

It is incumbent on railroad companies to employ none but sober men on their roads; and it is no justification or excuse to the company in employing an intemperate or incompetent man in a business involving such peril to life and limb that hands were scarce. For a sufficiently high rate of compensation, sober and competent men are always to be had.[5] So a depot company has no more right to knowingly and advisedly employ, or allow to be employed, on its premises, a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage beast or other animal. Hence a depot company is responsible for an assault committed on a passenger by a servant of a tenant of its parcel room, where the servant is a man of vicious propensities, who has frequently, during the six years of his employment there, attacked and beaten passengers, of all of which the depot company had notice.[6] Knowledge of the vicious or dangerous propensity must, however, be brought home to the carrier. This is illustrated in a curious case decided in Kansas a few years ago.[7] A passenger, purchasing a ticket at a station, contracted from the agent the disease of

[3] Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125.
[4] Tuller v. Talbot, 23 Ill. 357.
[5] Pennsylvania R. Co. v. Books, 57 Pa. 339.
[6] Dean v. Depot Co., 41 Minn. 360, 43 N. W. 54.
[7] Long v. Railroad Co., 48 Kan. 28, 28 Pac. 977.

smallpox, with which the agent was afflicted. It was held that the railroad company was not liable for the consequent illness of the passenger, if neither it nor any of its superior officers had any knowledge that the agent was afflicted with the disease. "The employment knowingly of an improper person to come in contact with the public would be gross misconduct, but if the master or railroad company is faultless in regard to employing an agent, and in continuing his employment, the master or railroad company ought to be excused civilly from the consequences of any secret disease, or like infirmity, of the agent, in the absence of all knowledge thereof. Even a dog which has manifested no vicious propensities may be kept by its owner without being tied or otherwise secured; but if the animal is vicious, and the owner has been notified of the fact, a duty is then imposed on him to keep the animal secure, and he is responsible for any mischief if he fails to observe this duty. The scienter must be established."

Sometimes it has been sought to hold a carrier liable for its failure to employ a sufficient number of servants. A statute in Maine requires railroad companies to furnish a brakeman for every two cars on its passenger trains.[8] But in New York it has been held that the failure of a street-railroad company to provide a conductor, in addition to a driver, on a one-horse car, is not negligence.[9]

[8] Rev. St. Me. 1883, c. 51, § 61, p. 481.

[9] Lamline v. Railroad Co., 14 Daly, 144.

CHAPTER VII.

DUTY TO GUARD AGAINST ACTS OF THIRD PERSONS.

§ 96. Principle Governing Liability.
97. Assault on Passenger.
98. Same—Knowledge of Danger.
99. Same—By Insane Passengers.
100. Abusive Language and Disorderly Conduct.
101. Other Wrongs to Passengers.
102. Crowds at Stations.
103. Interference with Passengers Embarking on and Alighting from Trains.
104. Train Wrecking.
105. Missiles Thrown from Cars.

§ 96. PRINCIPLE GOVERNING LIABILITY.

A common carrier is bound to exercise the highest practicable degree of care to guard his passengers against the assaults and all other wrongful acts of either fellow passengers or strangers.

Carriers of passengers are not insurers of the entire immunity of their passengers from the misconduct of fellow passengers or of strangers, any more than they are insurers of the absolute safety of passengers in other respects.[1] Nor can the carrier be held liable for such misconduct on the principle of respondeat superior, as in the case of the misconduct of his servants.[2] But although the doctrine is of comparatively

§ 96. [1] Kinney v. Railroad Co. (Ky.) 34 S. W. 1066; Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22.

[2] Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds, 53 Pa. St. 512; Mullan v. Railroad Co., 46 Minn. 474, 49 N. W. 249.

recent growth, it is now firmly established that a carrier of passengers must exercise the same high degree of care to protect them from the wrongful acts of their fellow passengers, or of strangers, that is required for the prevention of casualties in the management and operation of its trains, namely, the utmost care, vigilance, and precaution, consistent with the mode of conveyance, and with its practical operation.[3] While not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it

[3] Wright v. Railroad Co., 4 Colo. App. 102, 35 Pac. 196; Flint v. Transportation Co., 34 Conn. 554; Id., 6 Blatchf. 158, Fed. Cas. No. 4,873, affirmed 13 Wall. 3; Kinney v. Railroad Co. (Ky.) 34 S. W. 1066; Missouri, K. & T. Ry. Co. v. Russell, 8 Tex. Civ. App. 578, 28 S. W. 1042; Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22; Simmons v. Steamboat Co., 97 Mass. 361. It is the duty of a carrier to protect its passengers from violence at the hands of a fellow passenger, when it can be done by proper care. Evansville & I. R. Co. v. Darting, 6 Ind. App. 375, 33 N. E. 636. However, in Illinois Cent. R. Co. v. Minor, 69 Miss. 710, 11 South. 401, it is held that reasonable care and diligence, under all the circumstances, is all that is required of the carrier in this respect, and that he is not bound to exercise great vigilance and care in maintaining order, and guarding passengers against violence. So in Morris v. Railroad Co., 106 N. Y. 678, 13 N. E. 455, it is said: "In guarding passengers from injury by the falling of articles placed in a rack over a seat by another passenger, a carrier of passengers is not held to the highest care which human vigilance can give. That measure of care has been spoken of as due from them in the actual transportation of the passenger, and in regard to the results naturally to be apprehended from a failure to furnish safe roadbeds, proper machinery, perfect cars or coaches, and things of that nature. But, in regard to a danger of this kind, a carrier of passengers is, we think, held to a less strict measure of vigilance. Reasonable care, to be measured by the circumstances surrounding each case, to prevent accidents of this nature, is all that is required."

is the carrier's duty to provide ready help, sufficient to protect the passenger against assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties;[4] and, having furnished such force, the carrier is chargeable with their neglect in failing to protect a passenger from assaults by strangers.[5] This strict rule of duty must, however, be applied in view of the relation which the carrier sustains to all the passengers, and the circumstances of each particular case calling for its exercise.[6] Knowledge of the existence of the danger, or of facts and circumstances from which the danger may be reasonably anticipated, is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it.[7]

[4] Britton v. Railway Co., 88 N. C. 536; Batton v. Railroad Co., 77 Ala. 591; Flannery v. Railroad Co., 4 Mackey (D. C.) 111.

[5] Wright v. Railroad Co., 4 Colo. App. 102, 35 Pac. 196.

[6] Mullan v. Railroad Co., 46 Minn. 474, 49 N. W. 249.

[7] Wright v. Railroad Co., 4 Colo. App. 102, 35 Pac. 196; Sira v. Railroad Co., 115 Mo. 128, 21 S. W. 905; Royston v. Railroad Co., 67 Miss. 376, 7 South. 320. A conductor is only called to act upon improprieties or offenses witnessed by or made known to him, and the company can only be charged for the neglect of some duty arising from circumstances of which the conductor was cognizant, or of which, in the discharge of his duties, he ought to have been cognizant. Putnam v. Railroad Co., 55 N. Y. 108, reversing 36 N. Y. Super. Ct. 195. But in Springfield Consol. Ry. Co. v. Flynn, 55 Ill. App. 600, it is held that a common carrier of passengers is not liable for the acts of one passenger against another, upon the ground alone that the act was done in the presence of an agent of the carrier, and that such agent knew the act was done.

§ 97. ASSAULT ON PASSENGER.

The duties and powers of the conductor, when passengers are assaulted, are very clearly pointed out in one of the earliest cases on this subject.[1] The conductor, it is said, may stop the train, and call to his assistance the engineer, the fireman, all the brakemen, and such passengers as are willing to lend a helping hand. Until, at least, he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion, and busy himself with collecting fares in forward cars, while a general fight is raging in the rearmost car, where lady passengers have been placed, is to fall short of his duty. Nor does his exhortation to passengers to throw the fighters out come up to the demands of the hour. He should lead the way. He should stop the train, and hew a passage through the intrusive mass until he has expelled the rioters, or demonstrated, by an earnest experiment, that the undertaking is impossible. In another pioneer case on this subject, it was held that a steamboat company which permits drunken and disorderly soldiers, armed with loaded muskets, to occupy the space where passengers come on deck, without notifying passengers of the fact, so that they may avoid the danger, or which permits such soldiers to conduct themselves in a disorderly manner for a considerable time, without any effort on the part of officers or crew to suppress the disorder or protect the passengers, or induce the military officers so to do,

§ 97. [1] Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds, 53 Pa. St. 512.

is liable to a passenger, who was wounded by a discharge of a musket during a scuffle between the soldiers.[2] So where a passenger is assaulted by four other passengers in the presence of the conductor, who flees from the scene of conflict without doing anything to quell the fight, the company is liable.[3] A railroad company which negligently fails in its duty to preserve order, and to protect a peaceable passenger on one of its trains against riotous and disorderly fellow passengers, is liable for an injury to such passenger, caused by the careless discharge of a pistol in the hands of one of the turbulent fellow passengers.[4] And where a station house is located in a desert country, sparsely settled, with habitations few and far between, and is thrown open to the general public both before and after the arrival of trains, it is the duty of the ticket agent, who represents the company, to guard a person

[2] Flint v. Transportation Co., 34 Conn. 554; Id., 6 Blatchf. 158, Fed. Cas. No. 4,873, affirmed in 13 Wall. 3. In this case it was further held that the fact that the steamboat company was compelled to carry these soldiers by military authority does not release it from liability to plaintiff, whom it undertook to carry voluntarily, after the detachment of soldiers had arrived, without notifying him of that fact. In Pittsburg & C. R. Co. v. Pillow, 76 Pa. St. 510, the facts were these: During the course of a fight between two passengers on a train, one threw a bottle at the other, which struck another passenger, not participating in the quarrel, and put out his eye. It was shown that the conductor, though in the car, took no steps to stop the fight. The company was held liable.

[3] New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200.

[4] Illinois Cent. R. Co. v. Minor, 69 Miss. 710, 11 South. 101. In this case the court expressed some dissatisfaction with the decision in New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200, supra.

lawfully at such station, whether as a passenger or not, against unjustifiable assaults committed in his presence by another servant of the company, aided by strangers; and for the ticket agent's failure so to do the company is liable.[5] But to render a railroad company liable for injuries by one passenger to another, it must appear that the company was negligent in failing to put the passenger actually doing the injury off the car; and it is not sufficient that it failed to put off another passenger who had assaulted the one doing the injury.[6] Of course, the company is liable whenever its employés, instead of preventing, aid and abet other passengers in committing an assault on a fellow passenger. Thus, a railroad company is liable for excessive force used in removing a passenger from the train by a fellow passenger, aided and abetted by the conductor.[7]

The same principles are applicable to assaults on passengers in street cars. Thus, where a passenger in a street car is injured in a fight between other passengers, it is for the jury to say whether the company was negligent in failing to provide a conductor, or in having a driver who made no attempt to stop the fight or eject the fighters.[8] So the introduction of a manifestly intoxicated, quarrelsome, and indecently attired man into a street car by the employés of the company is an act of negligence, for the consequences of which

[5] Krantz v. Railway Co., 12 Utah, 104, 41 Pac. 717.

[6] Louisville & N. R. Co. v. McEwan (Ky.) 31 S. W. 465.

[7] International & G. N. Ry. Co. v. Miller, 9 Tex. Civ. App. 104, 28 S. W. 233. To same effect, see Murphy v. Railroad, 23 Fed. 637.

[8] Holly v. Railroad, 61 Ga. 215.

the company is liable; and when the conductor admits such a person into the car, in response to a statement by the driver that such person is "too full" to ride on the front platform, the negligence is aggravated and unjustifiable. The company is therefore liable for an unprovoked assault on a passenger by such person.[9]

§ 98. SAME—KNOWLEDGE OF DANGER.

It has heretofore been stated that knowledge of the passenger's danger, or of facts and circumstances from which that danger may reasonably be inferred, is necessary to fix the carrier's liability in this class of cases.[1] Thus, a passenger on a train who is assailed and beaten by a fellow passenger, while the conductor is absent attending to his duties in another part of the train, not knowing of the assault, or that it was threatened, cannot recover damages of the railroad company.[2] This principle is illustrated by a remarkable case which happened in New York. An intoxicated passenger on a street car annoyed and insulted a female passenger. Her male escort requested the conductor to make the intoxicated passenger keep quiet. The conductor did so, and the intoxicated passenger then used threatening language towards the conductor, but in so low a tone as not to be audible to the conductor or any one else, except a person sitting at his side. He then went out of the car, and rode the balance of the journey, some distance, on the front plat-

[9] Hendricks v. Railroad Co., 44 N. Y. Super. Ct. 8.

§ 98. [1] Ante, § 96.

[2] Royston v. Railroad Co., 67 Miss. 376, 7 South. 320.

form. As the female passenger and her escort left the street car by the rear platform, the intoxicated passenger jumped from the front platform, ran around to the rear, and struck the escort with a car hook, killing him. It was held that the street-car company was not liable for the homicide, as there was no evidence of want of proper care on the part of its servants.[3] In a still more remarkable case in Missouri it was held that the mere fact that a male passenger offered to escort plaintiff, a young girl 16 or 17 years old, to an hotel at the station where she was compelled to get off, and where she was a total stranger, is not sufficient to suggest to the conductor an assault and ravishment of plaintiff by her fellow passenger; and the company is not responsible for his act in decoying plaintiff to a saloon, instead of conducting her to an hotel, as he had promised to do, and there committing a revolting and brutal rape on her person.[4] A railroad company is not liable

[3] Putnam v. Railroad Co., 55 N. Y. 108, reversing 36 N. Y. Super. Ct. 195. An altercation occurred, in presence of the conductor, between the only two passengers in a car. One called the other a "liar," whereupon a very animated fistic encounter ensued, lasting a few seconds, which was terminated by the conductor, who separated the combatants. There was then no appearance of further trouble, but a few minutes later, after plaintiff had washed the blood off his face, his assailant, while passing along the aisle near him and the conductor, suddenly turned, and struck plaintiff again, in the mouth. The conductor interfered promptly, and took the assailant into the baggage car, after which plaintiff saw him no more. Held, that the action was properly dismissed by the court, because, apart from the fact that plaintiff was partly responsible for the difficulty, the conductor performed his duty, and neglected no reasonable precaution in the premises. Mullan v. Railway Co., 46 Minn. 474, 49 N. W. 249.

[4] Sira v. Railroad Co., 115 Mo. 128, 21 S. W. 905. For this crime,

for the death of a passenger at the hands of a train robber, in the absence of evidence that it or its employés knew of the impending danger, or of circumstances to arouse their suspicions. Cases holding that the company is bound to keep watch and ward over sleeping passengers apply only to thefts of their property, and not to a crime so horrid, and happily so rare, as that of murder.[5] The failure of a railway company to expel from its train an intoxicated passenger, not disorderly or boisterous, will not render it liable for an injury to a fellow passenger caused by the stumbling of the intoxicated passenger, and the falling of his pistol, which was discharged, wounding plaintiff. No human being could have foreseen what happened, or could have had any ground upon which to base an anticipation that such a result would follow the presence of the intoxicated passenger.[6]

But where a conductor permits a white passenger,

the male passenger was convicted, and sentenced to 35 years' imprisonment. State v. Dusenberry, 112 Mo. 277, 20 S. W. 461. In Felton v. Railroad Co., 69 Iowa, 577, 29 N. W. 618, the trial court instructed the jury that furnishing a flat car for the transportation of passengers was not such negligence as would render the railroad company liable for the death of a passenger, who was willfully thrown from the car by his fellow passengers, where the railroad company had no reason to anticipate such assault. The jury found specially that the company had no reason to anticipate the assault, but returned a general verdict for plaintiff. On defendant's appeal, it was held that the instruction must be taken as the law of the case, and the general verdict was set aside as in conflict therewith.

[5] Connell's Ex'rs v. Railway Co., 93 Va. 44, 24 S. E. 467.

[6] Galveston, H. & S. A. Ry. Co. v. Townsend (Tex. Civ. App.) 36 S. W. 485.

in violation of statute, to enter a car set apart for colored passengers, or permits him to remain after seeing him in the car, the company is responsible for his conduct while there, and is liable in damages to a passenger in such coach to whom he uses obscene and indecent language, or whom he otherwise maltreats, though the conductor was not present at the occurrence, and had no reason to anticipate that the intruder would create trouble. "If a contrary rule is applicable, and no liability exists on the part of the corporation to the passenger, the separate coach law becomes a dead letter, and those who are entitled to its protection have no means of enforcing its provisions but by an indictment, where a penalty may be adjudged in favor of the state. Where there is a neglect of duty for which a penalty is imposed, and private injury results from this neglect, a cause of action arises in favor of the person injured." [7]

It must, however, be borne in mind, that when facts and circumstances exist from which danger to the passenger may reasonably be inferred, the duty of protection against that danger arises. Thus, where a railroad company engaged in transporting nonunion laborers on a regular passenger train has reasonable grounds to believe that they will be attacked by strikers, the duty rests on it to exercise the highest degree of care and diligence to carry its regular passengers safely, and to guard them against any and all damages that may arise from such attack. In this case it appeared that repeated assaults had been made by strik-

[7] Quinn v. Railroad Co. (Ky.) 32 S. W. 742.

ers on nonunion laborers while being transported to and from their work, and they could be embarked and discharged at their place of work only by the aid of a powerful police force. Assaults had been made on the train which carried them as far as two miles from the place of embarkation. One evening the railroad company used a regular passenger train to take these laborers away, and the mob at the place of embarkation was more dangerous and violent than usual. A mile and a half further on, the train came to a stop at a railroad crossing. A detachment of strikers, who had secreted themselves there, took possession of the train, and began a furious and cruel assault on the nonunion laborers. During the melée, a pistol was discharged, and plaintiff, a passenger on the train, but not a laborer, was dangerously wounded. It was held that the railroad company was guilty of negligence in stopping the train at that point, though it had the legal right to do so, and that consequently it was liable for plaintiff's injuries.[8] So a railroad company is liable

[8] Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22. It would seem, however, that the railroad company ought not to have been held liable, if a statutory duty to stop before going over the crossing existed. A passenger, on entering a car ready to receive passengers, was assaulted by three men, and discovered that his pocketbook was missing. He then called loudly for help, saying he was being robbed. His assailants then apparently commenced searching for the pocketbook, and it was found, and returned to plaintiff. He again called for help, the altercation was renewed, and the three men again assaulted plaintiff, inflicting on him serious and permanent injuries. Held, that whether the cries for help were loud enough to be heard by the trainmen, or some of them, if they were in their proper places, and whether it was the duty of defendant to have any of its employés stationed in the car where the assault was made,

for insults, assaults, and abuse of a colored passenger on a train by drunken white passengers, where the conductor has knowledge of the facts, and refuses to interfere. A colored passenger is entitled to the same protection against drunken and violent men, seeking to molest, outrage, and humiliate him, as a white passenger.[9]

§ 99. SAME—BY INSANE PASSENGERS.

If the safety and reasonable comfort of the other passengers will not be imperiled thereby, a railroad company may carry an insane person to the end of his journey, though not accompanied by attendants, or he may be removed from the train at the first station where he may be properly cared for; but, whether he be carried in the train a longer or a shorter distance, the company is bound, so long as he is in the train, to do whatever, in the way of restraint or isolation, is reasonably demanded for the safety and comfort of other passengers. If the carrier knows that in fact a passenger is violently insane, and may at any moment

were questions for the jury. Wright v. Railroad Co., 4 Colo. App 102, 35 Pac. 196.

[9] Richmond & D. R. Co. v. Jefferson, 89 Ga. 554, 16 S. E. 69. A railroad company is liable for the expulsion, by her fellow passengers, of a colored passenger from a car in which she is rightfully riding, where the conductor was fully aware of the desire for her expulsion, of the fact that ribald songs and coarse and insulting language had been indulged in for the purpose of vexing her, and where he took no steps to protect her when notified that the expulsion was in progress, or to restore her to her place after the expulsion had been accomplished. Britton v. Railway Co., 88 N. C 536.

do violence to others, it is justified, and in fact it may be its imperative duty, to exercise proper restraint, although at the time he may be quiet, and apparently harmless.[1] Hence, where a passenger who has been drinking heavily shows symptoms of delirium tremens, and labors under the delusion of pursuit by enemies on the train, who would rob or kill or harm him in some way, and in childish but real fear appeals to the conductor for protection, it is the duty of the conductor, knowing him to possess a pistol, to disarm him; and the

§ 99. [1] Meyer v. Railroad Co., 4 C. C. A. 221, 54 Fed. 116. In this case the facts were as follows: A railroad company transported an insane man in irons, and accompanied with attendants. Three weeks later, the same man, unaccompanied by attendants, took passage on another train, in charge of the same conductor and train hands, who recognized him. During the journey he had a dull, heavy, and sullen look, which might indicate insanity, and he applied to the conductor for protection, and frequently complained to fellow passengers about being pursued by Jews. The day after beginning the journey, he shot and killed a fellow passenger on a sleeping car, and likewise the conductor. Held that, if the railway company at any time became chargeable with knowledge of the insane passenger's actual condition, then it would be charged with the duty of doing whatever a high degree of care would demand for the protection of the other passengers on the train; but, if the evidence failed to show that the company had become chargeable with such knowledge, no ground would exist for holding it responsible, and that the question whether it had such knowledge was for the jury. On a subsequent appeal in this case, it was held that evidence that the slayer was violently insane, in a distant city, two or three weeks before the homicide, is competent and relevant to the issue of his insanity at the time of the killing, and cannot be excluded because it does not go to prove the railroad company's knowledge thereof, as it is not necessary to prove both matters at the same time and by the same witnesses. St. Louis, I. M. & S. Ry. Co. v. Greenthal, 23 C. C. A. 100, 77 Fed. 150.

failure so to do renders the company liable for the death of a passenger, shot by the insane passenger in imaginary self-defense.[2]

§ 100. ABUSIVE LANGUAGE AND DISORDERLY CONDUCT.

Not only must the carrier guard the passenger from assaults by fellow passengers and others, but it must also protect him from their abusive or insulting language and disorderly conduct. Thus, where a conductor is informed of the fact that a drunken passenger is calling a female passenger foul names, and is using insulting and abusive language to her, the failure of the conductor to interfere and remove the drunken passenger will render the company liable for his subsequent abuse and insult of the female passenger.[1] So passengers in a second-class car are entitled to protection against the acts of fellow passengers, to the extent that good conduct must be exacted from persons inclined to vulgar and offensive conduct and language.[2] A railroad company may be compelled to respond in damages even for the shrewish tongue of the wife of the station agent. A woman who enters a railroad station with the intention of becoming a passenger may recover damages for mental suffering caused by abusive language addressed to her by the wife of the station agent, in his hearing, and without his interference.[3]

[2] King v. Railway Co., 22 Fed. 413.

§ 100. [1] Lucy v. Railway Co., 64 Minn. 7, 65 N. W. 944.

[2] St. Louis, A. & T. Ry. Co. v. Mackie, 71 Tex. 491, 9 S. W. 451.

[3] Texas & P. Ry. Co. v. Jones (Tex. Civ. App.) 39 S. W. 124.

But one of two railway passengers who were acquaintances, and had been drinking together, and who entered the train together, cannot recover damages from the carrier for abusive language used towards him by the other, who was intoxicated, or even for an assault, where the conductor used all reasonable efforts to protect him, quieted the offender once or twice, and, on his again becoming boisterous, gave him into custody at the next station.[4] Nor is the company liable to a female passenger for obscene and profane language, indecent exposure of person, and other disorderly conduct, by two or three intruders, who came into the waiting room at a station, while plaintiff was awaiting the arrival of the train, where the company had no notice of any facts which justified the expectation of such an outrage, and no employé of the company knew of the occurrence when it happened, except a colored employé or porter, whose duties were confined to looking after the baggage.[5] And where a passenger on a vessel, from intoxication and ridiculous conduct, becomes the sport and butt of the other passengers, the captain, who remonstrates, but takes no other steps to prevent it, is not liable in damages, since no man ought to complain of being ridiculed when he has made himself ridiculous.[6]

[4] Kinney v. Railroad Co. (Ky.) 34 S. W. 1066.
[5] Batton v. Railroad Co., 77 Ala. 591.
[6] Hessian v. Ferguson, 7 La. 532.

§ 101. OTHER WRONGS TO PASSENGERS.

As we have seen, it is the duty of the conductor, under ordinary circumstances, to protect his passengers from trespass while under his care; and if he stands by, and sees them illegally molested in any way, without an effort to protect them, it is negligence, for which the company is liable. He is not, however, required to enter into a contest with, or put himself in opposition to, the officers of the law; and a conductor, who merely stands by, without taking part in the illegal arrest of a passenger by known policemen, is not necessarily bound to inquire into their authority, or assert his own against it. If, however, the conductor participates in the illegal arrest, the company is liable.[1] So, where one assuming to act as a police officer offers to put upon the cars, as a passenger, a person whom he claims to have arrested for crime, the conductor is not required to stop the train, and inquire into the cause of and authority for the arrest.[2]

The duty to guard the passenger against the acts of fellow passengers may even render the company liable for injuries self-inflicted through fear, caused by the acts of fellow passengers and train hands. Thus,

§ 101. [1] Duggan v. Railroad Co., 159 Pa. St. 248, 28 Atl. 182, 186.

[2] Jackson v. Railroad Co., 87 Mo. 422. In this case an officer of the law placed on a train a man mortally wounded, whom he claimed to have arrested. The conductor remonstrated with the officer against carrying the man, and stopped the train, but desisted when the officer showed his badge of office, and stated that he had the papers authorizing the arrest. Held, that the company was not liable for carrying off the passenger.

where passengers and the conductor on a train so work on a passenger's mind by threats to tie, rob, and throw him from the train, that he jumps from the moving train in order to save himself from the imagined impending calamity, the company is liable for injuries sustained in the leap.[3]

But a carrier is not negligent in failing to guard against accidents which could not have been reasonably anticipated. Thus, where the dress of a female passenger on an open street car is set on fire by a lighted match carelessly thrown by a fellow passenger, and she jumps from the car, and is severely burned, before the driver, who immediately stopped the car, could render any assistance, the company is not liable.[4]

§ 102. CROWDS AT STATIONS.

Where a railroad company, by means of reduced rates and advertisements, induces an unusually large crowd to collect at a station, it is bound to use such means as are reasonably necessary to prevent injury to individuals from the conduct or pressure of the crowd in passing to and from its trains.[1] And, in an action by a passenger who was thrust off the platform and injured by the swaying of the crowd, the question

[3] Spohn v. Railway Co., 87 Mo. 74.

[4] Sullivan v. Railway Co., 133 Mo. 1, 34 S. W. 566.

§ 102. [1] Taylor v. Pennsylvania Co. (C. C. Ohio) 50 Fed. 755. A jury is warranted in finding negligence, where a railroad company permitted its station platform to become overcrowded with persons waiting for trains, so that one of them was pushed off the platform and injured. McGearty v. Railway Co., 15 App. Div. 2, 43 N. Y. Supp. 1086.

whether the proper precautions were taken is for the jury.[2] But when the company has provided a staff of servants sufficient to discharge the duties of preserving order among numbers, by guiding and instructing them as to the mode of obtaining and taking their places in the carriages, it need not go further, and furnish a staff sufficient to cope with the force and violence of a lawless crowd, rushing through the station.[3]

§ 103. INTERFERENCE WITH PASSENGERS EMBARKING ON AND ALIGHTING FROM TRAINS.

Neither the common law nor statute imposes on the carrier the duty of escorting outgoing passengers from the interior of the car to a place of safety outside the station grounds, nor incoming passengers from its waiting rooms to a seat inside the train. Nor is a common carrier bound to protect its passengers from rudeness or bad manners on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace.[1] Thus, a railroad company is not liable for injuries to a female passenger, who, as she was

[2] Hogan v. Railway Co. (1873) 28 Law T. (N. S.) 271.

[3] Cannon v. Midland Ry. Co., L. R. 6 Ir. C. L. 199. In this case a railroad company, which had sold a large number of harvest tickets, increased its force of servants from four to seven, in order to handle the crowd. While waiting for the train, a fight ensued in the village at which the station was located, between the harvest men and the villagers. When the train arrived, the outside crowd made a rush into the station, and pushed three of the harvest men from the platform, one of whom was killed by the approaching engine. Held, that the company was not liable for his death.

§ 103. [1] Ellinger v. Railroad Co., 153 Pa. St. 213, 25 Atl. 1132; Graeff v. Railroad Co., 161 Pa. St. 230, 28 Atl. 1107.

about to alight from a street car, was jostled off by another passenger, rudely pushing by her to enter the car.[2] Neither is a railroad company liable for injuries to a passenger about to leave a station through a swinging storm door for injuries caused by an impatient traveler entering the station, who heedlessly rushes ahead, violently pushes the door open, and causes it to forcibly strike plaintiff.[3] Neither is it liable for the act of a passenger in catching hold of a bell rope to steady himself as the train is stopping, which has the effect of causing a signal to be transmitted to the engineer to start the train, and an injury

[2] Ellinger v. Railroad Co., 153 Pa. St. 213, 25 Atl. 1132.

[3] Graeff v. Railroad Co., 161 Pa. St. 230, 28 Atl. 1107. Where a boy, 14 years old, stands on the platform of a crowded street car, with one foot resting on the steps, and is pushed off by a passenger rushing out of the car as it approaches a transfer station, it is proper to charge that the company is not liable for the conduct of the passenger, unless it was unusual and disorderly, and could have been prevented by the persons in charge. Randall v. Railroad Co., 139 Pa. St. 464, 22 Atl. 639, affirming 8 Pa. Co. Ct. R. 277. A railroad company is not liable to a passenger, who was injured, while attempting to board a moving train, by stumbling over a person standing on the car platform, where no want of care on the part of the company is shown in permitting him to be where he was. Hollman v. Railroad Co., 2 Posey, Unrep. Cas. (Tex.) 557. A railroad company is not liable for the act of an incoming passenger in stepping on the foot of a passenger about to alight, where the guard had requested people on the platform to allow the passengers to leave the car before they attempted to enter, and his request was not heeded. Thomson v. Railway Co., 75 Hun, 548, 27 N. Y. Supp. 608. A railway company is not liable for the act of a stranger, who crowded plaintiff from a car step just as the train was about to start, resulting in an injury to plaintiff by striking against a post near the track, while running along with the train, trying to get on. Chicago & N. W. Ry. Co. v. Scates, 90 Ill. 586.

to result to another passenger by the sudden start of the train while alighting.[4] So any encouragement given to a passenger by other passengers to attempt to get off a train at a place of danger, and not a stopping place, except for water, resulting in injury to him, cannot be imputed to the railway company as in any way its act, and it is not responsible for the same.[5] An elevated railroad company is not liable for the act of a drunken passenger in stepping on the foot of a fellow passenger, though the guard's attention had been called to his intoxication, where he had done nothing that would have justified the guard in removing him from the car.[6]

104. TRAIN WRECKING.

A railroad company is not bound to take precautions against the criminal acts of strangers which render its track unsafe, and which could not have been foreseen by any human skill or knowledge. This principle is illustrated by a recent case decided in Pennsylvania. A passenger was injured in a collision between his train and two loaded coal cars. On the morning of the day of the accident, the coal cars had been left on a side track at a distance of about two miles from the place of the collision. The cars were properly braked, and a throw-off switch, which would have derailed the cars, if left undisturbed, was left open, so as to throw

[4] Ferry v. Railroad Co., 118 N. Y. 497, 23 N. E. 822, affirming 54 N. Y. Super. Ct. 325.

[5] Illinois Cent. R. Co. v. Green, 81 Ill. 19.

[6] Thomson v. Railway Co., 75 Hun, 548, 27 N. Y. Supp. 608.

the cars from the track if they were moved. The cars remained in this condition during the day. Late in the afternoon a boy got upon the cars, loosed the brakes by hammering them with a coupling pin, and closed the throw-off switch. The cars ran down the siding onto the main line, and collided with the plaintiff's train. It was held that the railroad company was not negligent in failing to open another throw-off switch nearer the main track, or in failing to furnish either switch with locks, since it was not bound to anticipate the boy's criminal acts.[1] But a railroad com-

§ 104. [1] Fredericks v. Railroad, 157 Pa. St. 103, 27 Atl. 689. In this case the court said: "The injury was not the result of any defect in any of the appliances used by defendant, nor of any want of skill, foresight, and diligence which was humanly possible. The injury was not the result of any act of carelessness or negligence on the part of anybody. It was the result exclusively of a deliberate, intended, willful, affirmative, positive act of criminal trespass. No mere act of carelessness or negligence could have turned over the switch, which was set to derail the cars, so that it would throw the cars on the track instead of off. No mere act of carelessness or negligence could or would have taken out the coupling pin which held the cars together. No mere act of carelessness or negligence could or would have driven back the ratchet which held the brakes in place,—four of them in all,—so as to set the cars in motion. All and every one of these acts required special physical effort, exerted for the very purpose of releasing the cars from the entirely sufficient restraints which had been imposed on them by the company's agents; and these efforts were made, each one after the other, in a wicked and deadly succession, until the horrible purpose was accomplished, and the work of death and destruction resulted. How can it be said that any human skill, foresight, or diligence could have divined or believed or imagined that such acts would have been perpetrated? It would require a gift of omniscience to foresee them, or a gift of prophecy to foretell them; and neither of these qualities are human. It is useless to say that addi-

pany is bound to so secure its cars on side tracks that they cannot be put in motion by the careless acts of strangers, as distinguished from their willful or criminal acts.[2] So a railroad company is not liable for injuries to a passenger caused by the malicious acts of strangers in removing the spikes which fastened the chairs and rails to the ties and sleepers, where it appears the three other trains had safely gone over this portion of the road within two hours before the acci-

tional precautions might have been taken. So they might, if the possibility of such acts could have been known in advance. A force of men might have been stationed at the cars, to prevent the possibility of another force of men invading them and not setting them loose; but such transactions are outside the pale of human experience, and it is simply preposterous to say that the omission to take that kind of precaution is negligence, in any aspect of the case. Placing blocks under the wheels, and locks on the switches, avails nothing against the deliberate and intended purpose to set free loaded cars in such circumstances as these. The same purpose which would turn over the switch, take out the coupling pin, and then hammer at the brakes until they were opened, would remove blocks from the wheels, and shatter the lock on the switch. But it is not one or another particular act of precaution, the want of which is to be set up as a test of the legal duty of precaution, but the whole criminal purpose sought to be accomplished. If that purpose and corresponding action were such as not to subject defendant to a duty of precaution against it, the presence of some precautions, and the absence of others, which might or might not have been effective, or might have been more effective than those that were observed, is of no moment in the consideration of the general question as to the existence of the legal duty. If the purpose and the act were criminal, and were those of a stranger, and could not have been foreseen by any human skill or knowledge, the duty of precaution against such acts does not arise, and negligence does result from the want of such precautions. The rule of highest skill and care does not require the impossible, or the very extreme of care and precaution that can be imagined."

[2] Smith v. Railroad Co., 46 N. J. Law, 7.

dent, which occurred during the night.[3] Neither the conductor of a train nor the company is obliged to keep constant watch of the rails on both sides of a train standing at a station, to ascertain whether dangerous explosives are placed under the cars, either by strangers or employés of the company not acting within the scope of their employment; and, where the conductor is ignorant of the fact that a fireman has placed torpedoes on the track on a Fourth of July, the conductor's act in starting the train without removing the torpedoes is not negligence, so as to render the company liable to a person on the platform injured by their explosion.[4]

§ 105. MISSILES THROWN FROM CARS.

Occupants of postal cars are no exception to the rule requiring the carrier to guard passengers from the violence of others. While a railway company has no right to interfere with a United States mail agent in the discharge of his official duties, yet it has the right, and it is its duty, to prevent him, while on its trains, from continuing any dangerous practice of which it has notice, which is liable to cause injuries to passengers and others lawfully on its premises.[1] Hence a railroad company which knowingly or habitually suffers mail bags to be thrown upon its passenger platform from rapidly moving trains is directly and indi-

[3] Deyo v. Railroad Co., 34 N. Y. 8. See, also, Houston & T. C. Ry. Co. v. Lee, 69 Tex. 556, 7 S. W. 324.

[4] Chicago, B. & Q. R. Co. v. Epperson, 26 Ill. App. 72.

§ 105. [1] Galloway v. Railway Co., 56 Minn. 346, 57 N. W. 1058.

vidually liable to a person who may be injured thereby, while lawfully on the platform.[2] So it is the company's duty to guard against accidents which may befall passengers by stumbling over such bags in the dark.[3] But a railroad company is not liable for the act of a postal clerk in throwing a mail bag on the station platform, in the way of passengers entering the car, unless the mail bag had been so thrown on other occasions before the accident, and the company knew, or should have known, the fact.[4] And a railroad com-

[2] Carpenter v. Railroad Co., 97 N. Y. 494, reversing 24 Hun, 104; Snow v. Railroad Co., 136 Mass. 552; Williams v. Railroad Co. (Ky.) 32 S. W. 934; Ohio & M. Ry. Co. v. Simms, 43 Ill. App. 260. A custom of mail clerks, continued for a period of two years, to throw mail sacks from the cars on the station platform, will charge the company with notice of the practice, though the sacks were not always thrown on the same place on the platform. Ayres v. Railroad Co., 4 App. Div. 511, 40 N. Y. Supp. 11. And since the practice is one from which injury to a person on the platform may reasonably be anticipated, it is not necessary, to charge the company with liability, that on some former occasion a like injury had occurred. Galloway v. Railway Co., 56 Minn. 346, 57 N. W. 1058.

[3] Sargent v. Railway Co., 114 Mo. 348, 21 S. W. 823.

[4] Ayres v. Railroad Co., 77 Hun, 414, 28 N. Y. Supp. 789. See, also, Muster v. Railroad Co., 61 Wis. 326, 21 N. W. 223, where a railroad employé was struck by a mail bag thrown from the postal car. A notice from a railroad company, instructing baggage masters and mail agents to throw the mail at particular points, concluded with these words: "It must be distinctly understood, however, that this does not in any way relieve baggage masters and mail agents from using all possible precautions against liability of injuring any one in throwing off mails." Held, that these words did not make it the duty of the baggage master, on trains carrying mail agents, to observe how mail bags were thrown off, nor render the baggage master's neglect in making such observations the neglect of the railroad company, so as to make it responsible for the negligence of the mail agent in throw-

pany which has established a rule that the express car shall be unloaded outside the depot, and not in the depot, is not responsible for an injury to a passenger, who, while passing through the depot, was struck by a bag thrown from the express car in violation of the rule.[5]

ing off the mail. Pennsylvania R. Co. v. Russ, 57 N. J. Law, 126, 30 Atl. 524.

[5] Ferrell v. Railroad Co. (Dist. Ct.) 12 Wkly. Law Bul. 234.

CHAPTER VIII.

DUTY TO PASSENGERS UNDER DISABILITY.

§ 106. Passenger under Disability Entitled to More Attention than Ordinary Passenger.
107. Sick and Infirm Passengers.
108. Same—Duty in Receiving and Discharging.
109. Same—Ejection and Carrying Past Destination.
110. Children.
111. Intoxicated Passengers.
112. Same—Ejection.

§ 106. PASSENGER UNDER DISABILITY ENTITLED TO MORE ATTENTION THAN ORDINARY PASSENGER.

The rule requiring the carrier to exercise the highest degree of care for the safety of its passengers compels it to take into account differences in the ages and bodily condition of passengers; and the carrier must bestow a degree of attention, beyond that given to an ordinary passenger, on one whom it knows, or has reason to know, to be affected by a disability.

It seems to be a proposition applicable to the entire law of negligence that greater care is required when dealing with a person known to possess less than ordinary faculty, than when dealing with one in possession of all his faculties.[1] Certainly a sick or an aged passen-

§ 106. [1] In estimating the probability of danger to others, we are entitled to assume, in the absence of anything to show the contrary, that they have the full use of common faculties, and are capable of

ger, a delicate woman, a lame man, or a child, is entitled to more attention and care from a railroad company than one in good health or under no disability. All these classes are entitled to ride in the cars, and what would be reasonable care towards others might well be carelessness or neglect towards them.[2] Yet, unless the servants of a railroad company know of, or have reason to believe, the existence of a disability on the part of a passenger, the company is held to no greater degree of care towards him than if the disability did not exist.[3] But in determining whether or not the agents of a railroad company have reason to know the existence of the disability of a passenger, it will be presumed that they have the ordinary senses. They certainly are presumed and required to have the ordi-

exercising ordinary caution. Thus, where a deaf man is run over for want of hearing a shout or whistle, this cannot be set down to the fault of the train employés. And this is not because there is any fault in the person harmed, for there may well be no fault at all. On the other hand, it seems clear that greater care is required of us when it does appear that we are dealing with persons of less than ordinary faculty. Thus, if a man driving sees that a blind man, an aged man, or a cripple, is crossing the road ahead, he must govern his course and speed accordingly. He will not discharge himself, in the event of a mishap, merely by showing that a young and active man, with good sight, would have come to no harm. Pol. Torts (Webb's Ed.) p. 564.

[2] Sheridan v. Railroad, 36 N. Y. 39. The degree of care is the same,—that is to say, the greatest care,—but what would be sufficient to insure the safety of one person may not be sufficient for others physically less able to take care of themselves. St. Louis, A. & T. Ry. Co. v. Finley, 79 Tex. 85, 15 S. W. 266. See, also, East Line & R. R. Ry. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834; Wardle v. Railroad Co., 35 La. Ann. 202.

[3] Jacksonville St. Ry. Co. v. Chappell, 21 Fla. 175.

nary eyesight, so that they can distinguish between a man in the vigor of life and a woman in a state of pregnancy, and accompanied by young children. They are expected to have, and must have, in order to discharge their duties properly, judgment enough to know that what would be safe for the one would not be safe for the other.[4]

§ 107. SICK AND INFIRM PASSENGERS.

In a pioneer case on this subject it was said: "Railroad cars are not traveling hospitals, nor their employés nurses. Sick persons have the right to enter the cars of a railroad company; as common carriers of passengers, they cannot prevent their entering their cars.

[4] Baltimore & O. R. Co. v. Leapley, 65 Md. 576, 577, 4 Atl. 891. In Keller v. Railroad Co., 27 Minn. 178, 6 N. W. 486, it is said: "As railroad companies carry not merely the vigorous and active, but also those who, from age or extreme youth, are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter may make their exit from the cars, but by the time in which the other class may, using diligence, but without hurry and confusion, alight. Those in charge of the trains are bound to presume that there may be such persons on the cars, and, unless they know they are not, they have no right to start the trains until they have waited long enough to allow such persons to alight; nor, even after waiting a reasonable time for such persons to get off, have they a right to start the trains without using reasonable care to ascertain if there are such persons in the act of getting off." This decision is certainly opposed to the weight of authority, in so far as it holds that the carrier is bound absolutely to know that passengers under disability are on the train; and it probably stands alone in holding that the carrier, after stopping the train a reasonable length of time at a station, is bound to ascertain whether passengers are in the act of getting on or off before starting the train. See ante, § 66.

If they are incapable of taking care of themselves, they should have attendants along to care for them, or to render them such assistance as they require in the cars, and to assist them from the cars at the point of debarkation." [1] Now, in so far as this case holds that the known disability of the passenger casts no additional duty on the carrier, it certainly is not sound. "In travel by ship, care and medical attendance are always provided by the company as one of the necessities of the journey. In travel by rail no such necessity exists, and therefore a railroad company is under no obligation to furnish hospitals on wheels, or physicians or nurses to attend the sick on their journeys. But without hospitals, and without physicians and nurses of their own, still much can be done to alleviate the pains and aches of a sick passenger. While the train is in motion, the passenger is utterly helpless as to aid, except from those on the train. His fellow passengers owe him no duty except humanity. The alternative is presented of being cared for by his fellow passengers, by the company, or to writhe in pain and sickness until relieved by death or the end of his journey. By taking passage and paying his fare, the relation of

§ 107. [1] New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607, followed in Pullman Palace-Car Co. v. Barker, 4 Colo. 344. In the Mississippi case it was held that the failure to stop a train at a station a sufficient length of time to enable a sick passenger to get off does not render the company liable, where the conductor stopped the train a second time within 60 feet of the platform, and had the passenger carried on a chair into the station house, with the assistance of the company's employés, though he refused to back the train into the station. No fault can justly be found with this decision, but the language in the opinion quoted in the text is too sweeping.

carrier and passenger is established between the company and himself, and, as he is under the control of the company for many purposes, and debarred by the rapid movement of its train from receiving aid from the outside world, it would seem to follow, as a necessity of the situation, that those who have received his money, and are thus rapidly transporting him, should assume the obligation of taking reasonable care of him, in case of sickness while on the train. The obligation is on the company, not only for the benefit of the sick person, but also for the comfort, and sometimes the safety, of other passengers. A sick person, by his cries and moans, may so annoy the other passengers as to require his removal to a separate department of the train. In case of smallpox or cholera, or other contagious disease, the comfort and safety of the other passengers would demand the early removal of the afflicted passenger. The company would in such case be charged with the duty of removal, and reasonable care thereafter, until the afflicted person could be otherwise cared for." [2] It was accordingly held that, where a passenger becomes ill during the journey, the railroad company is under obligation to give him such care as is fairly practicable, with the facilities at hand, without thereby unduly delaying its train, or unreasonably interfering with the safety and comfort of its other passengers.[3] And if the company voluntarily accepts

[2] Lake Shore & M. S. Ry. Co. v. Saltzman, 52 Ohio, 558, 40 N. E. 891, affirming 9 Ohio, C. C. 230.

[3] Id. In this case it was held that a passenger assisting in carrying a sick passenger from one car to another may recover for injuries sustained in stepping between the platforms, where there was not

a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such a case, it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his physical and mental condition. This is a duty required by law, as well as the dictates of humanity.[4]

The practical applications of these principles have been quite numerous. Thus a sick passenger on a street car is entitled to be treated as such, the conductor knowing of his condition.[5] Where the only passenger on an electric car is taken suddenly ill, and requests the conductor to stop the car, so that she can get off, it is for the jury to say whether the conductor was negligent in refusing her request, and leaving her uncared for, when there was no other person at hand to render her assistance.[6] The fact that a passenger's arm was broken before he undertook a journey does not debar him from recovering for injuries sustained in a railroad wreck, though he would have escaped injury had he been physically sound.[7] A railway carrier of passengers has no right, where care and diligence can

sufficient light to enable a person to see the danger, and no warning was given.

4 Croom v. Railway Co., 52 Minn. 296, 53 N. W. 1128.

5 Atlanta Consol. St. Ry. Co. v. Hardage, 93 Ga. 457, 21 S. E. 100.

6 McCann v. Railway Co. (N. J. Err. & App.) 34 Atl. 1052.

7 Allison v. Railroad Co., 42 Iowa, 274.

prevent it, to leave a helpless passenger, who has fallen from one of its trains, through its negligence, in a situation of known danger; and where it knows of the fact that he is lying on the track in an unconscious condition, it must use proper care and diligence to prevent injury from passing trains.[8] Where an upper tier of berths in the steerage gives way in the nighttime, and a passenger in one of the lower berths, believing that the ship is going down, becomes paralyzed with fear, she is entitled to such care in removing her from the berth as will furnish her protection in her prostrate condition; and the steamship company is liable for injuries sustained from the rolling of the ship, while she was lying on the floor, unable to control herself, after her removal from the berth.[9]

§ 108. SAME—DUTY IN RECEIVING AND DISCHARGING.

A passenger, blind, aged, sick, or infirm, whose condition is known to the carrier, is entitled to more care and attention, as well as to greater time and assistance, in getting on and off, than a physically sound passenger.[1] Where a railroad company knows of an in-

[8] Cincinnati, I., St. L. & C. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340. A conductor, who is informed of the dimness of vision and enfeebled condition of a passenger, should use such care as the passenger requires to prevent injury. Columbus, C. & I. C. Ry. Co. v. Powell, 40 Ind. 37.

[9] Smith v. Packet Co., 86 N. Y. 408, affirming 46 N. Y. Super. Ct. 86.

§ 108. [1] Hanks v. Railroad Co., 60 Mo. App. 274. A street-railroad company must stop its cars a sufficient length of time to enable a passenger to alight in safety. The length of such time must neces-

firmity of a female passenger, which renders it unsafe for her to alight without the aid of a footstool, the failure of the company to provide a footstool, as was its custom, is a fact from which a jury may infer negligence.[2] A railroad company, however, is under no obligation to furnish personal assistance to an infirm passenger in alighting, if its train hands have no knowledge of the infirmity.[3] But a conductor who knows that a passenger on his train is suffering from a disease which requires her to have special assistance in getting on and off must furnish it.[4]

sarily depend on the circumstances of each case, among which are the age and condition of the passenger. A person who is a cripple, or otherwise feeble and infirm, is entitled to consideration on that account. Colt v. Railroad Co., 33 N. Y. Super. Ct. 189, affirmed in 49 N. Y. 671. In determining whether a train stopped a reasonable length of time to permit a female passenger, 65 years old, and weighing 170 pounds, to alight, the jury may take into consideration her age, sex, and physical condition. Hickman v. Railway Co., 91 Mo. 433, 4 S. W. 127. See, also, ante, § 66 et seq.

[2] Madden v. Railroad Co., 35 S. C. 381, 14 S. E. 713.

[3] Daniels v. Railroad Co., 96 Ga. 786, 22 S. E. 956.

[4] Madden v. Railroad Co., 41 S. C. 440, 19 S. E. 951, and 20 S. E. 65. A passenger was taken sick during his journey, and received some attention from the train hands. The train stopped at his destination for two minutes. No one saw the sick passenger alight, but shortly afterwards he was found beside the track near the station platform so severely injured by the train that he died soon afterwards. Held, that it could not be said, as matter of law, that the failure of the train hands to assist him in alighting was negligence; and that the finding of the trial judge, trying the case without a jury, that it was not, could not be set aside on appeal. Brady v. Railroad Co., 162 Mass. 408, 38 N. E. 710.

§ 109. SAME — EJECTION AND CARRYING PAST DESTINATION.

Although a common carrier of passengers owes obligations to its well passengers, as well as to those who are sick, and is bound to protect the rights of both; and although, when the condition of one passenger, from sickness or otherwise, is such as to be inconsistent with the safety, health, or even comfort of his fellow passengers, regard for the rights of the latter will authorize the carrier to terminate the carriage, by excluding him,—yet this right cannot be exercised arbitrarily or inhumanly, or without due care and provision for the safety and well-being of the ejected passenger.[1] The duty of the company to such a passenger

§ 109. [1] Conolly v. Railroad Co., 41 La. Ann. 57, 5 South. 259, and 6 South. 526. In this case it was held that a passenger stricken with apoplexy while riding in a street car, although attended with severe vomiting, to the inconvenience and great discomfort of other passengers, cannot be removed while in a speechless and helpless condition, and laid in the open street on a bleak, drizzling December day, and there abandoned, with no effort to procure him attention, without a violation by the carrier of its duty as such, and liability for resulting damage. It was further held that the mistake of the driver in supposing that the passenger was drunk, when the latter had ridden a considerable distance without misbehavior, and had been guilty of none, except the vomiting occasioned by his illness, cannot excuse the company. The court said: "It should need no parade of learned authorities to maintain the proposition that a common carrier cannot treat an unfortunate passenger stricken with apoplexy while under its charge, in the manner above indicated, without a breach of its plainest obligations of its contract of carriage. If there were any precedent to the contrary, humanity would revolt at it, and it would be one more honored in the breach than in the observance." In Lemont v. Railroad Co., 1 Mackey (D. C.) 180, however, it was held

does not end, however, with his removal from the train, but it is bound to the exercise of reasonable and ordinary care in temporarily providing for his protection and comfort. But it performs this duty to a passenger without friends or money, when it carefully and prudently removes him from its train, and promptly places him in charge of the overseer of the poor.[2]

that a conductor of a street car may remove from the car a person who has been guilty of disorderly and annoying conduct; and the fact that it afterwards appears that the passenger was sick will not render the company liable, where the passenger did not inform the conductor of the fact, and the conductor believed him to be drunk.

[2] Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877. Where a passenger on a train breaks out with eruptions, and the best medical advice that can be obtained is unable to disclose whether they proceed from smallpox, and the prior conduct and statements of the passenger warrant a well-grounded, clear, and honest belief that smallpox is developing, the officers of the train are justified in ejecting him, though it afterwards turns out that they were mistaken. But they must eject him at a place where he can obtain accommodations and medical treatment. Paddock v. Railroad Co., 37 Fed. 841. A lunatic was traveling with his father, who had paid fare for both. The father got off at an intermediate station for refreshments, and on his return to the train was unable to find the lunatic, who had changed his seat. The conductor, in the absence of the father, applied to the lunatic for his ticket, not knowing him to be insane, or that his fare had been paid. On refusal of the lunatic to surrender his ticket or pay his fare, the conductor put him off the train at another station. Held that, since the conductor was ignorant of the fact of insanity, the company was not liable for the death of the lunatic, caused by being run over by another train. Willetts v. Railroad Co., 14 Barb. (N. Y.) 585. A conductor who, in accordance with the request of a disabled passenger, with paralyzed hands, claiming to have a ticket in his pocket, undertakes to search for the ticket, should do so properly, and in good faith and with reasonable diligence; but only so far as the passenger himself asks. If the passenger limits his request to a search of one pocket, which he designates, the con-

Two cases from Mississippi on this subject serve to show how the facts of each particular case control the courts in their announcement of general principles. In Sevier v. Vicksburg & M. R. Co. it was held that, though a passenger is sick and drowsy when he enters a train, and informs the conductor of this fact, the conductor is not bound to arouse him at destination, and his promise to do so imposes no obligation on the railroad company, and does not render it liable for carrying him four miles past his destination, compelling him to walk back in the nighttime.[3] In Weightman v. Louisville, N. O. & T. Ry. Co. it was held that where a passenger, seriously ill, is accepted as such, with full knowledge of the conductor, under a promise that the conductor will take care of him, and assist him from the train, if necessary, the company is liable for his death, caused by being carried beyond his destination,

ductor is not bound to search further, and may eject the passenger for refusal to pay fare after giving him a reasonable time to search for the ticket. Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128, 150.

[3] 61 Miss. 8. The court said: "If persons sick or under any disability, which renders them unable to conform to the reasonable regulations for the community generally, are inconvenienced by their disability, they have no legal cause of complaint against the carrier, who undertakes to carry the public generally, according to a plan adopted to suit persons in a condition to travel, and not designed to meet the wants of those not in such condition. * * * One too sick, or from any cause not able to do as travelers usually do in conforming to the usage in running trains for the traveling public, should avoid them, or secure the assistance necessary to enable them to accomplish what is required of passengers generally. Carriers are not required to adapt their methods to the circumstances of those not in condition to comply with the requirements made of travelers generally."

and put off at night at a small way station, where he remained without care and attention for 40 hours.[4]

§ 110. CHILDREN

The cases all recognize the rule that children of tender years are not to be treated as persons of mature years. This is a reasonable and humane rule, and any other would be a cruel reproach to the law.[1] A common carrier of passengers for hire is required to exercise the greatest care and precaution against the occurrence of accidents, and to provide cars which will be safe, not only for the transportation of adults, but of infants as well.[2] If, on account of a passenger's youth and inexperience, he is incapable of taking proper care of himself, the carrier is bound to exercise the highest care and vigilance necessary and proper to se-

[4] 70 Miss. 563, 12 South. 586. In this case the court said: "That the wanton, reckless, inhuman conduct of the defendant in putting an almost dying man from its train, under the revolting circumstances set out in the declaration in this case, creates liability on the wrongdoer's part, we do not hesitate to affirm. It was the wanton exposure to almost certain death by the railroad company of one not a trespasser, —a passenger, to whom it owed a duty; at least the duty which common humanity proclaims, and which the general law of civilized Christendom echoes, not to wantonly or recklessly injure another. Trespassers on trains and tracks, wrongdoers and swindling dead beats, may not be willfully or wantonly injured, or subjected to imminent risks of deadly peril. This humane doctrine is imbedded in our laws; it is rooted in all laws of every enlightened kingdom or commonwealth under the wide circuit of the sun."

§ 110. [1] Indianapolis, P. & C. Ry. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70. As to the carrier's negligence in permitting children to ride on street-car platforms, see ante, § 85.

[2] Metropolitan R. Co. v. Falvey, 5 App. D. C. 176.

cure his safety.[3] Thus a railroad company is bound to give an 11 year old boy passenger, traveling unattended, such care and attention as his safety reasonably requires or demands, in view of his tender years and presumable lack of experience, and much greater care than to an adult passenger.[4] So, where a 7 year old boy, without fault of his parents, wanders to a railroad station, and gets on a passenger train, it is negligence for the conductor to expel him from the train at the next station, miles from home, without asking any one to look after his safety, or give him attention; and it is likewise negligence for the employés of another train, who discover him on the track a mile and a half from the station, to fail to stop the train, when it is within their power to do so, before it runs upon the child.[5] But the mere fact that a child

[3] Philadelphia City Pass. Ry. Co. v. Hassard, 75 Pa. St. 367; West Philadelphia Pass. Ry. Co. v. Gallagher, 108 Pa. St. 524.

[4] Hemmingway v. Railway Co., 72 Wis. 42, 37 N. W. 804. In this case it was held that the failure of a conductor of a freight train to notify the boy that the train will not stop at the station platform, but at some distance beyond, warrants the jury in finding that he did not exercise proper care and caution, which will render the company liable for injuries sustained by the boy in jumping from the train to the platform, under the belief that he will be carried by the station.

[5] Indianapolis, P. & C. Ry. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70. In the case of a boy nine years old, the duty of the carrier towards him while alighting must be performed with due regard to his apparent condition. Ridenhour v. Railway Co., 102 Mo. 270, 13 S. W. 889, and 14 S. W. 760. Where it appears that passengers on an elevator are liable to lose their balance on its starting, and that the elevator car is not provided with a door, it is a question for the jury whether the operator is negligent in starting the car without instructing a nine year old child, his only passenger, as to how she can protect herself from falling, though ordinarily it would not be his

of tender years is permitted by the conductor to enter a passenger train at a regular station is not, of itself, sufficient to charge the company with negligence. No principle exists that requires railroad companies to keep watch to prevent persons, young or old, from entering their passenger trains at regular stations.[6] So a carrier of passengers will not be held responsible for injury to a boy passenger caused by his own imprudence, merely because of his age,—nearly 10 years.[7]

In the case of children of tender years in the care of parents on a train, the carrier has a right to rely and act on the presumption that the parent will take such care of them as the natural love of a prudent father or mother would prompt them to exercise under such circumstances. But train hands, who see that children so traveling are or will be exposed to danger, or, seeing them, and exercising reasonable care and diligence, ought to know that they are or will be so exposed, have no right to act upon such a presumption, and it is their duty to use all reasonable and practicable care and diligence to avoid the danger and avert the injury.[8] But where a four year old child, a passenger on a street car, accompanied by a person of sufficient age and discretion to take care of it, is put off the car by the conductor at the proper place, and the person

duty to do so. McGrell v. Office Building Co., 90 Hun, 30, 35 N. Y. Supp. 599.

6 Indianapolis, P. & C. Ry. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70.

7 Cronan v. Railroad Co. (La.) 21 South. 163.

8 St. Louis, I. M. & S. Ry. Co. v. Rexroad, 59 Ark. 180, 26 S. W. 1037.

having charge of the child follows it, and both reach the street in safety, and are waiting for the passing of a car on a parallel track, the railway company is not responsible if the child runs towards the passing car, strikes it, and is thrown down and injured.[9]

§ 111. INTOXICATED PASSENGERS.

Where the servants of a railroad company know that a passenger in a state of helpless intoxication is in a position of danger on a moving train, their failure to take him to a place of safety is negligence which renders the company liable for his death.[1] But where a passenger's intoxication is not apparent, and the company's employés do not in fact know of it, they are bound to use towards him only the care and prudence that a sober man would require for his safety.[2] Where a passenger, partially intoxicated, is riding on the platform of the car, it is the duty of the railroad company, after the conductor has notice of his condition and exposure to danger, to use the ordinary precautions, such as calling his attention to the danger, and the rules of the company forbidding such exposure, and inviting him to go inside the car. But, if the passenger fails to heed the warning or accept the invitation, the conductor is not required to use physical force to compel him to go inside, or put him off the train; and, where the passenger afterwards, without the conductor's knowledge, goes on the car steps, the

[9] Schneidau v. Railroad Co., 48 La. Ann. 866, 19 South. 918.

§ 111. [1] St. Louis, A. & T. H. R. Co. v. Carr, 47 Ill. App. 353.

[2] Strand v. Railway Co., 67 Mich. 380, 34 N. W. 712.

company is not liable for injuries sustained in falling off, owing to the usual movement of the train.[3] So where an intoxicated passenger reaches his destination, voluntarily alights from his train at the station, makes arrangements for his baggage, and leaves the company's premises, and thereby ends all further obligations of the company to him, the company owes him no further duty as passenger, and is not responsible for his death, caused by his wandering back to the depot during the night, and lying down on the track, and falling asleep, where he is run over by a train.[4]

§ 112. SAME—EJECTION.

While the right generally of railroad companies to put off their trains persons who refuse to pay their fare is unquestionable,[1] yet it does not follow that this right may be exercised in such a manner, under such circumstances, or against a person in such mental or physical condition, as that death or serious bodily harm will necessarily or even probably result.[2] If a passenger on a train is intoxicated to a degree to render him unconscious of danger,—unable to take in his position, surroundings, and perils, and his duty to avoid them,—or he does not possess the power of locomotion, and is put off the train by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and

[3] Fisher v. Railway Co., 39 W. Va. 366, 19 S. E. 578.

[4] Rozwadosfskie v. Railway Co., 1 Tex. Civ. App. 487, 20 S. W. 872.

§ 112. [1] See post, c. 24.

[2] Louisville, C. & S. R. Co. v. Sullivan, 81 Ky. 624.

these facts are known to the conductor, the latter is guilty of reckless and wanton negligence, rendering the company in whose employment he is liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected in a proper manner, and at a proper place.[3] Hence, where a conductor, with knowledge of the facts, ejects a helplessly intoxicated passenger between stations, on a bitterly cold day, for refusal to pay fare, the company is liable for injuries caused by freezing while he was lying helplessly in the snow. And if a passenger is so intoxicated that he is unconscious of danger, cannot grasp his position and surroundings and his duty to avoid danger from passing trains, or does not possess the power of locomotion, the conductor, who knows the facts, is guilty of negligence in putting him off in a deep cut, where it is difficult to avoid passing trains; and the company is liable for his death in the cut, caused by being run over by another train.[4]

But where the place of ejection is not such as to make it difficult to avoid passing trains, and the weather is not inclement, the company is not required to carry an intoxicated passenger, whose conduct is offensive and dangerous, to the next station before putting him off. All that is required of the company is to use no more force than is reasonably necessary for this purpose, and to place him off the track, out of the way of that train; and the company, having exercised prop-

[3] Louisville & N. R. Co. v. Johnson, 108 Ala. 62, 19 South. 51.

[4] Louisville, C. & S. R. Co. v. Sullivan, 81 Ky. 624.

er care in putting him off, is not liable by reason of the fact that he went upon the track, and was run over by another train.[5] And where an intoxicated passenger is removed from the car at a station, and conducted 15 feet from the track by the head brakeman, the company is not liable for his death, caused by his lying down on the track, and being run over by the train, the employés on which exercised ordinary care.[6] So a railroad conductor is not negligent in leading an intoxicated passenger from the car, and placing him about two feet from the edge of the station platform, and leaning him against some trunks; and the railroad company is not responsible for his death, caused by his losing his balance, and falling from the platform, though, if he had been placed further from the edge of the platform, no serious accident would have happened.[7]

[5] Johnson v. Railroad Co., 104 Ala. 241, 16 South. 75; Louisville & A. R. Co. v. Ellis' Adm'x (Ky.) 30 S. W. 979; Louisville & N. R. Co. v. Logan, 88 Ky. 232, 10 S. W. 655. A railroad company is not guilty of any wrong in putting off, between stations, a passenger who is fighting drunk, has engaged in a serious conflict with a brakeman and with another passenger, and who is suffering from no physical paralysis, so as to render it liable for his death caused by being run over by a train some time during the night. Railway Co. v. Valleley, 32 Ohio St. 345. Where a drunken passenger has been carried past his destination owing to his own fault, and refuses to pay fare to the next station, the conductor is not negligent in putting him off the train, and setting him down in the grass a few feet from the track; and the company is not liable for his death, where he afterwards lies down on the track, and is run over by a freight train, the employés on which did everything in their power to stop the train after discovering him. McClelland v. Railroad Co., 94 Ind. 276.

[6] Missouri Pac. Ry. Co. v. Evans, 71 Tex. 361, 9 S. W. 325.

[7] Dechert v. Railway Co., 17 Ill. App. 74.

To render a railroad company liable for the death, by exposure, of an intoxicated passenger, ejected from the train near a dwelling house, for nonpayment of fare, it must appear that the conductor had reasonable ground to believe that the passenger was so greatly under the influence of liquor as to be unable to find his way, or to walk to the nearest house or station. And a somewhat intoxicated passenger, who gets off safely, without assistance, when told that he must pay his fare or leave the train, and whom the conductor has seen a few minutes before in an eating house, demanding food, and acting somewhat boisterously, may be reasonably supposed to be capable of reaching a place of safety, where he is left in the evening, when it is neither raining nor freezing, within 200 yards of a dwelling house, and not far from the railroad station.[8]

[8] Roseman v. Railroad Co., 112 N. C. 709, 16 S. E. 766.

CHAPTER IX.

PROXIMATE CAUSE.

§ 113. Definition and General Principles.
114. Province of Court and Jury.
115. Examples of Proximate Cause.
116. Examples of Remote Cause.
117. Intervening Cause.
118. Combined and Concurring Causes.
119. Particular Injuries—Distinction between Actions on Contract and in Tort.
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122. Same—Unusual Consequences of Personal Injuries.
123. Same—Predisposition to Disease.
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§ 113. DEFINITION AND GENERAL PRINCIPLES.

For purposes of civil liability in actions of tort, defendant's conduct is the proximate cause of plaintiff's injuries when it produced them as a natural and probable consequence, in the estimation of a man of average competence and knowledge, placed in defendant's situation, and having like opportunities of observation.

In actions of tort, and also in actions for breach of contract, plaintiff must show, not only that defendant's conduct was wrongful, but also that it was the proximate cause of the injuries for which he sues. This principle was long ago stated by Lord Ba-

con. "It were infinite for the law to judge of cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." This general principle is obviously just. To illustrate from the decided cases: A passenger standing on the car platform as the train is approaching his station cannot recover for injuries sustained in being thrown from the car platform, on proof that the engineer failed to ring the bell when approaching the station, as required by statute. There is no relation of cause and effect between the wrongful act and the injury.[1] So, on the other hand, where the axle of a car breaks, the train is derailed, and the passenger is injured, no doubt can be entertained that the breaking of the axle is the proximate cause of the injury. But in a great many cases the task of distinguishing between remote and proximate cause is like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day.[2] No perfect or general definition of the term "proximate cause," which will enable courts and juries to draw that line, has ever been given, and it is doubtful whether the term is capable of exact definition. In dealing with this subject of proximate cause, it should be borne in mind that while the law to be administered by the courts should not be a mere reflex of uneducated public opinion, at the same time it should be the expres-

§ 113. [1] Alabama G. S. R. Co. v. Hawk, 72 Ala. 112.

[2] Bramwell, B., quoted by Blackburn, J., in Hobbs v. Railway Co., L. R. 10 Q. B. 111.

sion of a masculine common sense, and its decisions should not be founded on distinctions so subtle that they might have afforded fitting topics to the schoolmen.[3] Hence, in whatever form the definition of proximate cause may be stated, it should be taken, not so much as a logical definition, as a guide to the exercise of common sense. "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies of cause." [4]

As to the definition of proximate cause given at the beginning of this chapter, it is conceded that it fully applies only to injuries not intended by defendant. If it can be shown that the injuries inflicted were intended or actually foreseen by defendant, then the question of proximate and remote cause becomes immaterial. "That which a man intends and foresees is to him, at all events, natural and probable." [5]

Turning now to the definitions given by the courts, we find that they agree substantially with the one above laid down. "A long series of judicial decisions has defined proximate or immediate and direct damages to be the ordinary and natural results of negligence, such as are usual, and as therefore might have been expected; and this includes in the category of re-

[3] Fent v. Railway Co., 59 Ill. 349. The law regards practical distinctions, rather than those which are merely theoretical; and practically, where a man cuts off the hose through which firemen are throwing a stream upon a burning building, and thereupon the building is consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury. Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277.

[4] Pol. Torts (Webb's Ed.) p. 39.

[5] Id. p. 32.

mote damages such as are the results of an accidental or unusual combination of circumstances, which would not reasonably be anticipated, and over which the negligent party has no control." [6] "It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of attending circumstances." [7] In New Jersey the rule is as follows: "It is not nec-

[6] Henry v. Railroad Co., 50 Cal. 183.

[7] Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469. To recover damages for a tort, they must be naturally and proximately connected with and flow from it; they must be such as might be within the contemplation of the parties as a natural consequence of the wrongful act, as distinguished from a merely accidental result. Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39. "Proximate damages are the ordinary and natural results of the particular negligence, and therefore such as might have been expected." Jackson v. Railway, 13 Lea (Tenn.) 491. "The test for drawing the distinction between proximate and remote cause, in reference to the consequences of negligence, is the consideration whether the chain of events was so linked together as a natural whole that the final result was the natural and probable consequence of the wrongdoer's act." Haverly v. Railroad Co., 135 Pa. St. 50, 19 Atl. 1013; Hoag v. Railroad Co., 85 Pa. St. 293. "Proximate cause" literally means the cause nearest to the effect produced, but, in legal terminology, the terms are not confined to their literal meaning. Though a negligent act or omission be removed from the injury by intermediate causes and effects, yet, if the guilty party ought reasonably to have foreseen the ultimate consequences, such negligence is deemed in law the proximate cause of the injurious effect. Gulf, C. & S. F. Ry. Co. v. Rowland (Tex. Sup.) 38 S. W. 757. "A person is expected to anticipate and guard against all reasonable consequences, but he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect

essary that the wrongdoer should be able to anticipate the very occurrences which resulted from his laches; it is enough if, after they have happened, they are seen to have followed from his misconduct in the natural course of things, and within the reasonable range of probability; and it must be left to the jury to determine, according to the circumstances, whether the facts fit the standard of naturalness." [8] In actions for injuries to passengers, the following general rules have been laid down: "If the injury to a passenger resulted from the negligent act of defendant, that act will be deemed the proximate cause, unless the consequences were so unnatural or unusual that they could not have been foreseen and provided against by the highest practicable care." [9] "When the negligence of the carrier is established, and is of a character greatly to multiply the chances of accident which happened, and naturally leading to its occurrence, and when the evidence tends to connect the accident with the negligence, the mere possibility that the accident might have happened, even without the negligence, will not relieve the carrier from liability. Courts consider the natural and ordinary connection of events, and will not indulge in fanciful suppositions." [10]

to occur." Greenland v. Chaplin, 5 Exch., at page 248. See, also, ante, § 12, as to the carrier's liability for unforeseen and unexpected accidents.

[8] McCann v. Railway Co. (N. J. Err. & App.) 34 Atl. 1052.

[9] Louisville, N. A. & C. Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968.

[10] Reynolds v. Railway Co., 37 La. Ann. 694. The negligence of a common carrier will be deemed the proximate cause of an injury to a passenger, whenever the accident might reasonably have been foreseen by competent and experienced men, under all the circumstances,

In conclusion it should be noted that the cases on the subject of proximate cause are divisible into two classes. In the first class the question is whether or not plaintiff has any cause of action whatever for defendant's wrongful act. In the second class the question is, conceding that he has a cause of action, whether or not a particular injury which he has sustained is too remote to become an element of damages. The general principles governing these two classes are the same, but they will be kept distinct, as far as possible, in the following discussion, which, of course, deals primarily with actions for injuries to passengers.

§ 114. PROVINCE OF COURT AND JURY.

Whenever, on either the question of negligence or proximate cause, there may be reasonable differences of opinion as to the inferences or conclusions which may fairly be drawn from the undisputed facts, the question is one of fact to be submitted to the jury; but, when there is no room for such difference of opinion, the question is one of law for the court.

The foregoing is believed to be the true rule in the United States, and the test as to the relative functions of the court and jury on the question of proximate cause is the same as on the question of negligence. Where the connection between the act of negligence and the damages is so remote as to leave no ground for difference of opinion between fair-minded men as to wheth-

while in the exercise of extraordinary care and prudence. Davis v. Railway Co. (Wis.) 67 N. W. 1132.

er the negligence was the natural cause of the damage, the judge should decide it, and should not submit it to the jury; but where a substantial doubt arises as to whether the damage was the natural and proximate, or a speculative and remote, result of the negligence, the question should be submitted to the jury under proper instructions.[1] Thus, where a passenger is wrongfully ejected in the nighttime in a railroad yard with which he is entirely unacquainted, and while attempting to find his way out of the yard, and just as he has crossed a track, is struck a blow in the rear, and rendered unconscious, the question whether his injury is the proximate result of the defendant's wrongful act is for the jury.[2] In some cases, however, it is said that

§ 114. [1] Dunn v. Railway Co., 21 Mo. App. 188, 198; Pittsburgh, C., C. & St. L. Ry. Co. v. Klitch, 11 Ind. App. 290, 295, 37 N. E. 560.

[2] Lake Shore & M. S. Ry. Co. v. Rosenzweig, 113 Pa. St. 519, 541, 6 Atl. 545. A female passenger, while alighting from a street car, was thrown against the railing, hurting her right arm and left breast. From that time on, the breast became sore where struck, and a cancer shortly afterwards developed, ultimately necessitating the removal of the entire breast, without success in extirpating the roots of the disease; the cancer being pronounced incurable. All the medical experts testified that the blow was sufficient to have caused the development of the cancer. Held, that it was a question of fact for the jury whether the cancer was caused by the blow, and their finding that it was could not be disturbed by the court. Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74. Where an intoxicated passenger is wrongfully put off a train, and is killed by another train while walking along the track to his destination, the question whether his removal was the proximate cause of his death is for the jury, and it is error for the court to nonsuit plaintiff. Guy v. Railroad Co., 30 Hun, 399. It is for the jury to determine whether the negligence of a railroad company in failing to warn passengers that the train is about to start is the proximate cause of an injury to a passenger, who un-

while it is undoubtedly true, as a general proposition, that the question of proximate cause is for the jury, yet where there are no disputed facts the court may determine it.[3]

In England, however, the rule seems to be that the question of remote and proximate cause is for the court in all cases. This certainly appears to be the rule in actions for breach of contract. In McMahon v. Field,[4] Brett, L. J., said: "The question of the remoteness of damages has become a difficult one, since, according to the case of Hadley v. Baxendale, 9 Exch. 341, it is for the court and not the jury to determine whether the case comes within any of the following rules, namely —First, whether the damage is the necessary consequence of the breach; secondly, whether it is the probable consequence; and, thirdly, whether it was in the contemplation of the parties when the contract was made."

§ 115. EXAMPLES OF PROXIMATE CAUSE.

The wrongful act of a railroad company in leaving on the track, in a dazed condition, a passenger who has fallen from the train through its negligence, is the proximate cause of his death, resulting from being run

dertook to pursue the moving train, and was struck by the engine of another company while so doing. Perry v. Railroad, 66 Ga. 746.

[3] South-Side Pass. Ry. Co. v. Trich, 117 Pa. St. 390, 11 Atl. 627. When there is no conflict in the testimony, and all the causes to produce an injury are known and unquestioned, whether a given act in the chain of causation is the remote or proximate cause of the injury is a question for the court. Henry v. Railway Co., 76 Mo. 288.

[4] 7 Q. B. Div. 591.

over by another train.[1] Where a driver of a stage coach requires passengers to get out and walk up a mountain side on a bitterly cold day, during a blinding snowstorm, and fails to wait on the summit for two passengers who have been unable to keep up with the coach, the proximate cause of an injury to one of such passengers, whose limbs are frozen by the exposure, is the reckless and inhuman conduct of the driver in deserting the passengers.[2] The failure of the carrier to eject or restrain a passenger whom it knows to be violently insane is the proximate cause of the death of a fellow passenger, shot by the insane passenger.[3] Failure of a railroad company to light its station platform in the nighttime is the proximate cause of an injury to a passenger, who is injured by a misstep while walking along it to the train.[4] Negligence in sudden-

§ 115. [1] Cincinnati, I., St. L. & C. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340.

[2] McClelland v. Burns, 5 Colo. 390.

[3] Meyer v. Railway Co., 4 C. C. A. 221, 54 Fed. 116. In order to charge the company with the duty of restraining the insane passenger, it was not necessary that it should foresee that if he was not restrained he would kill the deceased passenger. If the situation was such that the company should have foreseen a reasonable possibility of injury being caused by the presence of the insane man on the train, then the obligation to take proper action for the protection of passengers arose, although the company could not possibly anticipate which one of the passengers might be injured by him, in case he was not restrained, nor whether or not his violence would cause death.

[4] Alabama G. S. R. Co. v. Arnold, 80 Ala. 600, 2 South. 337. A female passenger, over 70 years old, was set down in the dark at a country depot, not opened or lighted, and no one was there to give her information. She left the depot to search for a highway on which the house where she was to stay was situated. Failing in this attempt, she returned to the depot; and, in trying to reach the other

ly starting a street car while a passenger is getting on the step is the proximate cause of an injury to a violin carried by him, which struck against a pillar beside the track as he was thrown from the car.[5] The negligence of a railroad company in permitting the gate of one of its cattle cars to be out of repair is the proximate cause of injury to a shipper of stock, who, while endeavoring to secure the gate with a rope, was run over by the cattle, which had become frightened by the noise of a passing freight train.[6] The only passenger in an electric street car, a girl 18 years old, became suddenly ill, told the conductor she felt sick, and twice requested him to stop the car, so that she might get off. He failed to do so, and, going to the front of the car, began talking to the motorman. Plaintiff, growing worse, and becoming frightened and dazed, rose to her feet, and staggered towards the rear of the car, and there fell, unconscious, through the door. It was held that it was for the jury to determine whether the conductor's negligence in failing to stop the car, or to render plaintiff any assistance, was the proximate cause of her injuries.[7] An intending cabin passenger on a steamer sailing from a cholera infected port intended to forfeit his ticket, rather than make the voyage, if

end of the building, to shelter herself from a cold wind, she fell from the platform, and was injured. Held, that the jury was justified in finding that defendant's negligence in failing to have a light at the depot, or any person there who could give strangers information, was the proximate cause of the injury. Patten v. Railway Co., 32 Wis. 524.

[5] Schalscha v. Railroad Co., 19 Misc. Rep. 141, 43 N. Y. Supp. 251.

[6] Texas & P. Ry. Co. v. Bigham (Tex. Civ. App.) 36 S. W. 1111.

[7] McCann v. Railway Co. (N. J. Err. & App.) 34 Atl. 1052.

steerage passengers were on board. The agents of the steamer falsely and fraudulently represented that no steerage passengers were on board, and he took passage. During the voyage cholera broke out among the steerage passengers and the crew, the vessel was detained in quarantine, and the cabin passengers were put to inconvenience and suffering. It was held that the false representations were the proximate cause of the suffering in quarantine.[8]

§ 116. EXAMPLES OF REMOTE CAUSE.

A speed in excess of the rate allowed by city ordinance is not the proximate cause of an injury to a trespasser, who attempts to board a moving freight train.[1] Running a train past a station at a greater rate of speed than permitted by law is not the proximate cause of injury to one who voluntarily undertook to jump from the train.[2] Failure to stop a street car at the place where the conductor said it would stop is not the

[8] The Normannia, 62 Fed. 469. The damage did happen in part directly from the subject-matter of the deceit, and not wholly from an independent cause, such as a cyclone or collision; and, as the presence of the steerage passengers, and of the cholera among them, was certainly a contributing cause of the damage, that is sufficient to make defendant liable.

§ 116. [1] Western Ry. of Alabama v. Mutch, 97 Ala. 194, 11 South. 894. Same principle, Chicago, R. I. & P. Ry. Co. v. Koehler, 47 Ill. App. 147. In an action for injuries to a passenger sustained through falling down a stairway at a station, it is not enough to show that the stairs were of improper construction or in defective condition, but it must further appear that the fall was caused thereby. Davis v. Railway Co., 2 Fost. & F. 588.

[2] Howell v. Railroad Co. (Miss.) 21 South. 746.

proximate cause of injury to a passenger who undertook to leave the car while in motion, without making a further effort to stop it.[3] Failure to heat a car is not the proximate cause of injury to a passenger who was thrown from the platform while passing from car to car in search of a warmer one.[4] A horse car in which plaintiff was riding approached a wagon, loaded with lumber, coming from the opposite direction, and using the parallel rails of the street-car track. When this wagon was abreast of the car, its driver suddenly turned off the track, and a piece of the projecting lumber was thrust through the car window, striking plaintiff. It was held that the fact that the car was traveling at an unusual rate of speed was not the proximate cause of the accident, and that the street-car company was not liable.[5] A mixed passenger and freight train was stopped at a station where there was no station house. The locomotive was employed for some time in switching cars onto a side track, and then returned with several freight cars to be coupled to the train. The coupling was done in the ordinary manner, and the concussion was not unusually violent. But a child, nearly three years old, standing on the platform of the passenger car, was thrown from it, and under the wheels. The child's mother, who observed the accident, jumped

[3] White v. Railway Co., 165 Mass. 522, 43 N. E. 298. Failure to stop a street car on request is not the proximate cause of an injury resulting from the act of the passenger in jumping from the car while in motion. North Chicago St. R. Co. v. Wrixon, 51 Ill. App. 307.

[4] Sickles v. Railway Co. (Tex. Civ. App.) 35 S. W. 493.

[5] Alexander v. Railroad Co., 128 N. Y. 13, 27 N. E. 950, reversing 59 Hun, 616, 12 N. Y. Supp. 685.

from the car, thrust her arms under the wheels, and saved her child, but her own arm was caught under the wheels, and badly broken. It was held that the failure of the company to erect a station house at that place for the accommodation of passengers was not the proximate cause of the accident.[6] A wife, expecting her husband to arrive on a train in the evening in an intoxicated condition, sent her two sons to the station to bring him home. They were ordered from the depot by the agent in charge, without justification or excuse. After the boys had left, the husband arrived on the train, drunk, but knowing what he was doing. He left the train and the station, but returned some time during the night, went to sleep on the track, and was killed. It was held that the wrongful act of the ticket agent in driving the boys from the depot, thus preventing them from conducting him home, was not the proximate cause of his death.[7] Failure to stop a train as it passes a station house is not the proximate cause of an injury to a passenger, who follows the conductor to the open door of a car, to request him to stop it, and

[6] De Mahy v. Steamship Co., 45 La. Ann. 1329, 14 South. 61.

[7] Rozwadosfskie v. Railway Co., 1 Tex. Civ. App. 487, 20 S. W. 872. "At the time the agent required the boys to leave the depot, he did not know deceased was drunk, and would arrive in that condition, nor did he know that they were sent there to protect him on the way home on account of his expected helplessness from intoxication. He only knew that they were there to meet him. This being so, the wrong was too remote from the injury to create liability. Had he known all the facts, then his act would have included all its reasonable and probable consequences flowing therefrom. He and his principal could be held culpable only for what was known to him, or what he would be presumed to know."

whose finger is jammed by the slamming of the door, caused by the stopping of the train.[8] Before a passenger had time to enter a horse car, it started off at a rapid rate, and, while she had one foot on the car platform and the other on the car step, the driver suddenly whipped up, and she was bounced from the car. She alighted on her feet without injury, but was almost immediately struck by a runaway horse, and severely injured. It was held that the proximate cause of the accident was the runaway horse, and not the negligence of the driver.[9] The failure of a railroad company to

[8] Hardwick v. Railroad Co., 85 Ga. 507, 11 S. E. 832. The fact that a compartment on a train was negligently permitted to be overcrowded is not the proximate cause of an injury to a passenger in that compartment, who at an intermediate station stood up to prevent other persons from entering the compartment, and who was jerked forward by the starting of the train, and put his hand on the hinge of the carriage door at the very moment it was being shut by the porter, thus crushing his thumb. Railway Co. v. Jackson, L. R. 3 App. Cas. 193.

[9] South-Side Pass. Ry. Co. v. Trich, 117 Pa. St. 390, 11 Atl. 627. "It was certainly not a natural consequence of a person being upon a street that he would be struck by a runaway horse. Nor is there the slightest reason for saying that it would be a probable consequence. The utmost that can be said would be that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural." Id. Where two street-railway cars, going in opposite directions, are approaching each other, and the conductor of one of them negligently fails to stop the car to allow a passenger to alight, or negligently allows a woman or child, being a passenger, to leave the car while in motion, and such passenger, nevertheless, does alight safely on the opposite side from which the car is approaching, and, immediately turning to cross the street, is run over by the other car, the negligence in failing to stop the car, or to prevent the passenger from alighting, is not the proximate cause of the injury, as matter of law, and it is error to submit

provide separate cars for the accommodation of white and colored passengers, as required by law, is not the proximate cause of an assault by a white passenger on a colored passenger, riding on the platform of a car.[10] Robbery committed from the person of a passenger traveling in an overcrowded railway carriage is not such a natural and probable consequence of the overcrowding as to make the company liable to the passenger, even if the overcrowding was caused by the negligence of the company's servants.[11]

§ 117. INTERVENING CAUSE.

One of the most valuable criteria furnished us by the authorities on the subject of proximate cause is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of mischief, the other must be con-

the question to the jury. Dunn v. Railway Co., 21 Mo. App. 188. The act of the driver of a street car in striking a trespassing boy with a whip, to make him let go of the car brake, is not the proximate cause of an injury to the boy, who thereupon jumps from the car, and runs on a parallel track, where he is struck by another car. Mack v. Railway Co., 8 Pa. Co. Ct. R. 305.

[10] Royston v. Railroad Co., 67 Miss. 376, 7 South. 320.

[11] Cobb v. Railway Co. (House of Lords, 1894) 6 Reports, 203, affirming [1893] 1 Q. B. 459. An insurance company which has paid a policy on the life of a deceased person, killed by the negligence of a railroad company while a passenger, cannot recover from the railroad company the amount paid by it, since the loss of the insurance company is a remote and indirect consequence of the misconduct of the railroad company. Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265.

sidered as too remote.[1] Thus a railroad company is not liable for the death by suicide of an insane person, who, eight months before, had been injured in a railroad wreck, which produced the insanity. The proximate cause of the death was the insane man's own act of self-destruction. It was a new and a sufficient cause of death. "The argument is not sound which seeks to trace this immediate cause of death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible, or even logical, argument would reach back to that 'great first cause, least understood,' in which the train of all causation ends. The suicide was not a result naturally and reasonably to be expected from the injury received on the train. It was not a natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train." [2] The failure of a railroad company to stop its train at a station, and the command of the conductor to a passenger to jump from the train, are not the proximate causes of injury to such passenger, who alighted safely on the platform, but who was run into by a fellow passenger, and thrown under the train by force of the collision.[3] The negligence of a railroad company in permitting a locomotive, with banked fire, to stand

§ 117. [1] Insurance Co. v. Tweed, 7 Wall. 44.

[2] Scheffer v. Railroad Co., 105 U. S. 249.

[3] Reibel v. Railway Co., 114 Ind. 476, 17 N. E. 107. The negligence of a carrier in leaving a hatchway on one of its boats open does not render it liable for injuries to a passenger, who was vio-

on a side track, with several intervening tracks and switches between it and the main track, is not the proximate cause of an injury to a passenger on another train, in a collision with the engine, which was wrongfully and maliciously taken from the side track and run on the main track, and started along it, by some third person.[4] A shipper of stock, in the nighttime, went to the railroad yards to take passage on the train carrying his stock. He entered the caboose, and was told by one of defendant's servants that he could not remain inside, because the train was not ready. After remaining a short time on the platform of the caboose, the drover alighted, and while standing on an adjoining track he was injured by another train. It was held that his expulsion from the caboose was not the proximate cause of his injury, since the spontaneous action of an independent will intervened between the

lently pushed or pulled into it by strangers. Evansville, C. & M. S. Co. v. Wildman, 63 Ind. 370. Where a street car which has gotten out of the control of the company's servants is running rapidly down grade, and a passenger is pulled or crowded off by her fellow passengers, the fact that she was surprised, excited, or bewildered does not render the company liable for the intervening agency that pulled or crowded her off the car against her will. Joliet St. Ry. Co. v. McCarthy, 42 Ill. App. 49. The failure of a railroad company to stop its train a reasonably sufficient length of time to enable passengers to get off is not the proximate cause of an injury to a child, who was put off the train, after it had started, by a fellow passenger, if the jury finds that the act of the fellow passenger was not a natural and probable result of the company's negligent act. The act of the fellow passenger is an intervening cause, which relieves the company from liability. Texas & P. Ry. Co. v. Beckworth (Tex. Civ. App.) 32 S. W. 347.

4 Mars v. Canal Co., 54 Hun, 625, 8 N. Y. Supp. 107.

two events.[5] The mere fact that a trespasser on a train is intoxicated, but not unconscious, or in a stupor, does not render his rightful expulsion from the train at a point not dangerous, and with which he is familiar, the proximate cause of his death, resulting from his being struck by another train while on the track.[6] The assurance of the conductor of a stock train to a drover that cabooses would not be changed at a certain station is not the proximate cause of an injury to the drover, who got off the train at that station to examine his stock, and who climbed upon a stock car as the train started, and walked backward to the caboose, which was kicked from the train just as he was about to step on it, precipitating him to the track.[7]

[5] Henry v. Railway Co., 76 Mo. 288.

[6] Louisville & N. R. Co. v. Johnson, 92 Ala. 204, 9 South. 269. "Left where passing trains would not injure him without some intervening agency, if he afterwards wandered on the track, and placed himself in a position of peril, it was his own carelessness, for which defendant was not responsible." McClelland v. Railway Co., 94 Ind. 276. Where a drunken passenger is ejected at a station, and then lies down on the track, and is run over and killed by another train an hour later, about 200 yards from the place of ejection, the death is not the natural and probable consequence of the ejection. St. Louis & S. F. Ry. Co. v. Williams (Tex. Civ. App.) 37 S. W. 992. The expulsion of a drunken passenger from an electric car, shortly after sunset, upon a public highway, and near dwellings, is not the proximate cause of his death, caused by his wandering on defendant's tracks, and being struck by another car. Edgerly v. Railroad Co. (N. H.) 36 Atl. 558. See, to same effect, Georgia S. & F. R. Co. v. George, 92 Ga. 760, 19 S. E. 813.

[7] Chicago, St. P., M. & O. Ry. Co. v. Elliott, 5 C. C. A. 347, 55 Fed. 949. "The acts of the plaintiff in failing to return to the caboose at the end of the five minutes he was told that the train would stop, in climbing up the cars, and walking back on their tops to the rear of

The negligence of a conductor of a freight train in permitting a boy to ride in the caboose from the depot to a water tank is not the proximate cause of an injury to the boy, who got off the train in safety at the water tank, but who, after the train had started, caught hold of the ladder handle on one of the cars, and fell under the train on letting go his hold.[8] A railroad train ran into a person at a highway crossing with such force as to throw the body against a passenger at a station some distance away, injuring him. It was held that the railway company's failure to give a signal at the highway crossing was not the proximate cause of the passenger's injury, since the presence of the person on the

the last stock car, so that he arrived there at the very instant when the caboose was to be changed, were independent, intervening causes, that prevented the natural and probable consequences of the conductor's assurance and the movement of the train, and brought about an unnatural and improbable result, that no human foresight could have anticipated; an accident that resulted from a strange combination of fortuitous circumstances, few of which seem to have been more remote, or less likely to have produced the surprising consequences, than the conversation and acts of the conductor." But to show how circumstances alter cases, attention is called to Andrist v. Railway Co., 30 Fed. 345. In that case the facts were as follows: An emigrant train, which had stopped at a station overnight, suddenly started the following morning, without any signal, while the passengers were outside. Plaintiff, one of the passengers, jumped on the platform next his own, and, after waiting a moment, until a brakeman who stood in the passageway, moved aside, he proceeded to cross to his own car. At that moment the cars separated, having been previously uncoupled, to divide the train, and plaintiff fell between them, and was run over. Held, that the negligence of the company in starting the train without notice, and the breaking it asunder without warning, was the proximate cause of the injury.

[8] Louisville & N. R. Co. v. Webb (Ky.) 35 S. W. 1117.

track was an efficient intervening cause, and the engineer could not anticipate that his failure to give the signals would injure a passenger at the station.[9] While the combination of circumstances in this last case are remarkable, a recent case from Texas furnishes a still more extraordinary chapter of accidents. A passenger carried with him into a train a sack containing a jug filled with alcohol. He negligently placed the sack in a seat beside him, so that a part of the sack projected into the aisle of the car. Somehow or other the sack got untied, the jug fell on the floor and broke, and the alcohol was spilled. Another passenger, lighting a cigar, carelessly threw a lighted match into the alcohol, and it blazed up to the ceiling of the car, burning plaintiff, a third passenger, whose shoes and stockings had been saturated with the alcohol. It was held that the train hands, having no knowledge of the contents of the sack, were not negligent in permitting it to remain in the car, and that their negligence in permitting it to protrude over the seat into the aisle was not the proximate cause of plaintiff's injuries.[10]

But fright of a passenger at an impending peril caused by the carrier's negligence, which impels him to do some act that a person of ordinary prudence

[9] Wood v. Railroad Co. (1895) 16 Pa. Co. Ct. R. 290, affirmed 35 Atl. 699, where the supreme court of Pennsylvania said: "The injury to the passenger was not the natural and probable consequence of the negligence. It was not such a consequence as, under the surrounding circumstances, might and ought to have been foreseen by the train hands as likely to flow from their omission to give the signals."

[10] Gulf, C. & S. F. R. Co. v. Shields, 9 Tex. Civ. App. 652, 29 S. W. 652.

might do in the circumstances to avoid injury, is not a new or independent cause between the negligence and an injury sustained in the effort to avoid the peril. If, alarmed by the peril apparently occasioned by the derailment of a car, but acting as a person of ordinary prudence would in like circumstances, in endeavoring to avoid the same, a passenger betakes himself to the platform of the car, and jumps or falls off, or is jolted off by the car's motion, or pushed or crowded off by fellow passengers in the excitement of the moment, any injury to her health or person occasioned by her fright, or by her striking the ground, would be directly traceable to the derailment as its primary, proximate, responsible, and juridical cause. In law there would be no new or independent cause between the derailment and the injury.[11]

§ 118. COMBINED AND CONCURRING CAUSES.

The rule relieving a defendant from liability when there has been an intervening cause is subject to these qualifications: (1) Where one does an unlawful act, which, combined with an extraordinary and unfore-

[11] Smith v. Railway Co., 30 Minn. 169, 14 N. W. 797. Where a passenger, standing on a platform awaiting a train, has reasonable cause to believe that she is in peril from the approach of the train from an unexpected direction, by reason of the misplacement of a switch through the culpable negligence of the company's servants, and in running away, to escape the apprehended peril, falls and is injured, the jury is at liberty to find that the negligence in misplacing the switch was the efficient cause of the injury. Caswell v. Railroad Co., 98 Mass. 194. For contributory negligence of frightened passenger, see post, §§ 185–188.

seen cause, results in damage to another, the wrongful act, and not the intervening cause, is considered the proximate cause of the damage.[1] (2) When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which it would not have happened, it may be attributed to all or any of these causes.[2] But in all cases the true rule is that the injury must be the natural and probable consequence of the negligence, such as, under the circumstances, would have been foreseen by a person of average competence and knowledge, placed in defendant's situation, as likely to flow from his conduct. The leading case of this class is the famous Squib Case. There defendant threw a lighted squib into a building full of people. The person near whom it fell cast it from him, and a third person did the same. In this third flight, it struck plaintiff, exploded, and put out his eye. Defendant was justly held liable, notwithstanding the acts of the intermediate persons in casting the squib from themselves.[3] Another very good illustration is found in a recent case decided by the supreme court of Pennsylvania. Defendant, the proprietor of a coke furnace, used a railroad track in connec-

§ 118. [1] Salisbury v. Herchenroder, 106 Mass. 458.

[2] Ring v. City of Cohoes, 77 N. Y. 83; Waller v. Railway Co., 59 Mo. App. 410.

[3] Scott v. Shepherd, 3 Wils. 403, 1 Smith, Lead. Cas. 754. Where a vessel grounds on a shoal through the negligence of her master and crew, and is inevitably impelled by wind and tide against plaintiff's sea wall, the negligence of the master and crew is the proximate cause of the injury to the wall. Lords Bailiff Jurats of Romney Marsh v. Corporation of Trinity House, L. R. 5 Exch. 204, L. R. 7 Exch. 247.

tion with his furnace. This track formed the arc of a circle, and was crossed twice by the track of a common carrier railroad, which subtended the arc as a cord. Through the negligence of defendant's engineer, one of his engines on the furnace track collided, at one of the crossings, with a passenger train on the carrier track. Just before the collision, defendant's engineer reversed his engine, shut off the steam, and jumped to the ground. By the shock of the collision, the throttle on defendant's engine was reopened, and it started backward around the furnace track, and again collided with the passenger train on the second crossing, where it had been stopped, injuring plaintiff, a passenger. It was held that, though the shock of the first collision intervened to open the throttle, and to turn loose the destructive agency which inflicted the injuries, yet defendant was liable. Since the first collision was the result of the negligence of defendant's engineer, he must be bound to foresee whatever consequences might ensue from his negligence, without the intervention of some other independent agency, though, in advance, the actual result might have seemed improbable. No intermediate cause, disconnected with the primary fault, and self-operating, existed to affect the question of defendant's liability. It was the engineer's negligence that caused the first collision, and what occurred in consequence of this collision was not broken by the intervention of any independent agent whatever.[4]

Where a brakeman, on hearing a signal from the

[4] Bunting v. Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34.

locomotive whistle, calls out in a loud voice, "Jump for your lives," the fact that a fellow passenger thereafter shouts, "Come on boys, let's get off," will not relieve the railroad company from liability to a passenger, who jumped from the car; no danger being in fact imminent.[5] Where a carrier is negligent in per-

[5] Ephland v. Railway Co., 57 Mo. App. 147. "If the negligent action of the brakeman was such as might ordinarily be expected to produce panic among the passengers, and a belief of impending danger, the fact that the resulting action of the passengers added to plaintiff's terror, and operated as an additional inducement for his action, will not relieve defendant." Id. The employés of a manufacturer undertook to move a freight car standing on a side track to a place on that track where they could load it more conveniently. The side track was on a down grade, and, owing to a defect in the brake rod, such employés were unable to hold the car in position, and it ran on the main track, injuring a passenger in a car standing there. Held, that the question whether the defective brake rod, and the failure of the trainmen to open the safety switch leading to the main track, were the proximate causes of the injury, was for the jury. St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 887. The negligence of the engineer of a locomotive on an elevated train, in starting his engine when there are about 50 passengers on the track immediately in front of him, walking from the train to the station platform, is the proximate cause of an injury to one of the passengers, who was pushed from the track, falling to the pavement beneath, by the other passengers, while endeavoring to get out of the way of the train. Lyle v. Railway Co., 53 Hun, 637, 6 N. Y. Supp. 325, affirmed 127 N. Y. 668, 28 N. E. 254; McCabe v. Railway Co., 53 Hun, 636, 6 N. Y. Supp. 418. The failure to light a depot platform may be considered as the proximate cause of an injury to a passenger, who, in the dark, stumbled over a box placed there by a third person. Waller v. Railway Co., 59 Mo. App. 410. A stagecoach on which plaintiff's intestate was a passenger was thrown into a canal by the negligence of the driver. The lock keeper turned on the water, thereby causing the death, by drowning, of the passenger. Held, that the proprietor of the coach was liable. Byrne v. Wilson, 15 Ir. C. L. 332. It is difficult to harmo-

mitting a passenger coach to stand on a crossing with another railroad, the fact that the negligence of the employés of the other road also contributed to the collision, and that such negligence may have been the immediate cause thereof, does not relieve the carrier from responsibility.[6]

§ 119. PARTICULAR INJURIES—DISTINCTION BETWEEN ACTIONS ON CONTRACT AND IN TORT.

When we come to consider the class of cases where it is conceded that plaintiff has a right of action, but it is contended that a particular injury for which he claims damages is too remote, one great difficulty which confronts us is the fact that the test of remote-

nize this last case with a number of those cited in the preceding section on the subject of intervening cause, and its soundness seems somewhat questionable.

[6] Kellow v. Railway Co., 68 Iowa, 470, 23 N. W. 740, and 27 N. W. 466. A passenger on a railroad train was injured at an intersecting crossing in a collision with the train of another company. The track of the carrier company had been signaled as clear, and it proceeded, without stopping, to cross the track of the other company. The track of the other company had been signaled as not clear, but its trainmen disregarded the signal, and thus caused the collision. Held that, as between the passenger and the carrier company, the failure of its trainmen to stop the train for one minute before going on the crossing, as required by statute, was negligence, and a sufficiently proximate cause of the collision to entitle the passenger to recover. Graham v. Railway Co., 41 U. C. Q. B. 324. Where a street car is negligently started while a passenger is about to alight, the company is liable for all damages sustained by the passenger, though the fall is accelerated by the motion of the conductor's arm in endeavoring to save her. Macer v. Railroad Co., 47 N. Y. Super. Ct. 461.

ness in actions for breach of contract differs from the test which obtains in actions of tort. This difficulty is peculiarly great in actions by passengers, since the relation of passenger and carrier exists by virtue of contract, and in Code states, where the formal distinctions in pleadings between actions of tort and of contract have been abolished, it is sometimes extremely difficult to say whether the action sounds in tort or on contract.

The leading case on the subject of remoteness of damages in actions on contract is Hadley v. Baxendale,[1] where the rule is thus stated: Where a party has broken his contract, the damages which the other party should recover should be such as may fairly and reasonably be considered to arise naturally—that is, according to the usual course of things—from the breach; or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach. This rule, though followed generally in England and in this country, has been subjected to a great deal of criticism. In a recent English case[2] it is said: "It is said that the rule is that the damages, to be recoverable, should be such as would be fairly in the contemplation of the parties at the time the contract was made; but in my opinion the parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract." If, in

§ 119. [1] 9 Exch. 341.

[2] Cotton, L. J., in McMahon v. Field, 7 Q. B. Div. 591.

actions for breach of contract, the test of remoteness were whether the damages claimed are such as, at the time of the breach of contract, instead of its execution, could be foreseen by a reasonable man placed in defendant's situation, and possessing his knowledge and opportunities of observation, as likely to occur, the rule in actions for breach of contract and in tort would be very nearly the same. Such a result would certainly do away with a great many very subtle distinctions, which have operated harshly and unjustly, so far, at least, as actions by passengers are concerned.

Hobbs v. Railway Co.[3] was at one time regarded as the leading authority on the question of the remoteness of damages in actions by passengers for breach of the contract of carriage. In that case passengers were set down at midnight about three miles from their destination, and compelled to walk home. The night was drizzling, and one of the passengers caught cold, and contracted a severe illness, which lasted for several weeks. It was held that the inconvenience suffered in having to walk home was the immediate consequence of the carrier's breach of contract, and that damages therefor could be recovered, but that the cold and the illness were remote consequences, and that no recovery could be had therefor. This decision was placed on the ground that the inconvenience of having to walk home must have been in contemplation of the parties, as a necessary result of the breach of the contract of carriage, at the time it was entered into, but that the cold and the illness could not have been thus contem-

[3] L. R. 10 Q. B. 111.

plated. This decision, though followed by some of the American cases, has generally been rejected in this country, and it has been questioned in England.[4] The principle of the decision was, however, followed in a recent English case. A railroad company was held not liable for repeated assaults on a passenger by his fellow passengers, on the ground that its servants had no knowledge of any necessity for his protection when it contracted to carry him.[5] No American case goes so far as this. The universal rule in this country is that the duty to protect the passenger arises whenever the carrier knows, or should know, his danger, whether that knowledge be acquired when the contract of carriage is entered into, or during the progress of the journey.[6]

The distinction as to damages in actions of tort and for breach of contract was pointedly made by the su-

[4] See McMahon v. Field, supra.

[5] Pounder v. Railway Co. [1892] 1 Q. B. Div. 385. The court said: "What is the duty of a railroad company to its passengers? It arises out of the contract, and must be determined upon the facts known to the contracting parties at the time of the contract. Ordinarily it is the duty of a carrier of passengers, arising out of the contract of carriage, to carry the passenger upon the contracted journey with due care and diligence, and to afford him reasonable accommodation in that behalf. If the carrier omits either of these duties, he is responsible for the ordinary consequences arising to the ordinary passenger therefrom. There is no duty in these circumstances to take extraordinary care of a passenger by reason of any unknown peculiarity attaching to him." It was further held in this case that the fact that the company permitted the carriage in which plaintiff was riding to become overcrowded was not the proximate cause of his injuries. This case was commented on unfavorably in the house of lords in Cobb v. Railway Co. [1894] 6 Reports, 203.

[6] See ante, c. 7.

preme judicial court of Massachusetts.[7] A passenger was arrested by the conductor, who was a railroad police officer, for riding on a train with intent to evade payment of fare, was given into the custody of the police, and was detained over night at the place of detention provided for arrested persons. He sued the company in contract for breach of its contract to carry him as a passenger. The trial judge ruled that he was entitled to recover damages for his arrest and imprisonment, for indignities which he contended he suffered at the hands of the police, for his mental suffering, and for sickness produced by a cold while imprisoned. This was held to be error. The court said: "The distinction between the rules of damages applicable in actions of contract and of tort appears to have been overlooked at the trial. Without inquiring whether all the elements of damage admitted by the court would be competent, if this had been an action of tort for an assault and false imprisonment, we are of opinion that too broad a rule was adopted in this case. Damages for breach of contract are limited to such as are the natural and proximate consequences of the breach, such as may fairly be supposed to enter into the contemplation of the parties when they made the contract, and such as might naturally be expected to result from its violation. The detention of the plaintiff during the night, his discomforts in the place of detention, the cold which he took by reason of the dampness of his cell, and the indignities he suffered from the police officers, were not the immediate conse-

[7] Murdock v. Railroad Co., 133 Mass. 15.

quences of the breach of defendant's contract to carry the plaintiff to his destination. They were the results of intervening causes, not the primary, but the secondary, effects of the breach of contract; and are too remote to come within the rule of damages applicable in an action of contract."

As a general rule, however, the decision of the Hobbs Case, where not expressly repudiated in the United States, has been neutralized by holding that actions for failure to carry passengers to destination sound in tort, and not in contract. But, in the language of the supreme court of Minnesota:[8] "It seems to us that very often a great deal of time and learning has been unnecessarily expended in discussing the exact nature of the action. The important question, after all, is whether the injury was the direct and proximate, or only the remote, consequence of the wrongful expulsion."

§ 120. SAME—EXPOSURE FROM FAILURE TO CARRY PASSENGER TO DESTINATION.

In this country the rule is that a passenger who has been wrongfully compelled by the carrier to leave the train at a place other than his destination may recover, in an action of tort, for injuries to health from exposure necessarily encountered in reaching his destination. "That a person entitled to be carried to his destination, if set down at a wrong place, or if removed from the car in which he was being transported, be-

[8] Serwe v. Railroad Co., 48 Minn. 78, 50 N. W. 1021. See, also, post, c. —, "Damages."

fore the termination of the journey, would be put to serious inconvenience, and would be obliged to extricate himself therefrom, is to be anticipated. The wrongdoer is liable, not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to common experience, are likely to result. Nor is he exonerated from liability by the fact that intervening events or agencies contribute to the injury. The fact that injury to plaintiff is immediately caused by her own act in walking would not relieve defendant from liability, or make the injury one that did not directly result therefrom, if such walk was practically necessary, and if plaintiff was guilty of no want of due care in undertaking it." [1] In one of the leading cases on this subject in this country, it was held that in an action of tort for setting down a female passenger in the nighttime three miles short of her destination, whereby she was compelled to walk home, damages are recoverable for sickness and suffering resulting from a miscarriage caused by the walk, and that the fact that the railroad company's servants did not know her delicate state at the time does not relieve it from liability for the actual, direct consequences of the wrong.[2]

§ 120. [1] Spicer v. Railroad Co., 149 Mass. 207, 21 N. E. 363. A passenger wrongfully expelled from a street car may recover for the damages occasioned, not only by her expulsion from the car, but also by her walk to her destination, where there was no other way or means of reaching it. Id.

[2] Brown v. Railroad Co., 54 Wis. 342, 11 N. W. 356, 911, distinguishing Hobbs v. Railway Co., L. R. 10 Q. B. 111, and Walsh v. Railway Co., 42 Wis. 23, on the ground that these were actions for breach of contract. The following cases all hold that sickness caused by the

Where a girl eight years old, in poor health, is carried more than a mile past her destination, and is put off the train at a place with which she is not familiar, her fright and its effect on her health must be deemed the proximate results of the wrongful act.[3] So, a passenger who, through the fault of the railroad company,

passenger's exposure is the proximate consequence of the carrier's misconduct in putting him off at a wrong place. Lake Erie & W. Ry. Co. v. Close, 5 Ind. App. 444, 32 N. E. 588; Cincinnati, H. & I. R. Co. v. Eaton, 94 Ind. 474; International & G. N. Ry. Co. v. Terry, 62 Tex. 380; International & G. N. Ry. Co. v. Gilbert, 64 Tex. 536; Kentucky Cent. Ry. Co. v. Biddle (Ky.) 34 S. W. 904; Malone v. Railroad, 152 Pa. St. 390, 25 Atl. 638. In an action for being wrongfully expelled from a street car, illness resulting from exposure to cold in consequence of such ejectment is not too remote a consequence for damages; and where the evidence is that the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration, from an altercation with the conductor, when he left the car, and so liable to take cold, the jury were justified in finding that an attack of rheumatism and bronchitis was the natural and probable result of the ejectment, and in awarding damages therefor. Toronto Ry. Co. v. Grimsted, 24 Can. Sup. Ct. 570, affirming 21 Ont. App. 578, 24 Ont. 683. In an action for being carried past a station several hundred yards, by reason of which a passenger missed his conveyance, and was compelled to walk to his home in the nighttime, over a wet and muddy road, plaintiff may show that, being old and feeble, the walk and exposure caused a sickness from which the passenger never recovered, and which rendered him unfit for attending to his business up to the time of his death. Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 South. 360.

[3] East Tennessee, V. & G. R. Co. v. Lockhart, 79 Ala. 315. Where a carrier negligently puts a female passenger off at a station other than the one of her destination, and the passenger, in consequence thereof, is compelled to ride and walk, in the nighttime, through muddy roads and in wet weather, a sickness caused by fright, exposure, and fatigue of the journey is the proximate consequence of the carrier's negligence. Texas & P. R. Co. v. Hartnett (Tex. Civ. App.) 34 S. W. 1057.

has been carried about a mile past her destination, and been compelled to walk back that distance in the nighttime, over two long railroad bridges, may recover for sickness caused by the exposure and fright.[4]

But there is a class of cases which hold that a passenger who can find shelter at the place where he is wrongfully put off, or who can procure another conveyance with which he can reach his destination without exposure to the elements, cannot recover for the consequences of an exposure voluntarily encountered in walking to his destination. A duty rests upon the passenger to conduct himself prudently in the situation in which he has been placed, so that his discomforts and inconveniences should not be unnecessarily increased, and to so conduct himself that no danger should be unnecessarily run by him.[5] A person upon whom a wrong has been committed is under an obligation to

[4] Galveston, H. & H. Ry. Co. v. Crispi, 73 Tex. 236, 11 S. W. 187. A passenger who has been carried past his destination, and compelled to walk back in the dark, about a mile, over a muddy, uneven road, and across a ravine under a railroad trestle, may recover for a severe cold, caused by the exposure, culminating in an inflammation of the throat, and finally in injury to the vocal organs, and in a nervous disease affecting his eyes and face, known as corea, where the action is in tort, though the declaration contains no specification of the nature and kind of damages claimed. Alabama & V. Ry. Co. v. Hanes, 69 Miss. 160, 13 South. 246.

[5] Childs v. Railway Co., 77 Hun, 539, 28 N. Y. Supp. 894. For the wrongful act of a railroad company in causing a passenger to alight in the evening at a station two miles from her destination, no recovery can be had for injuries to plaintiff's health, caused by walking from such station to her destination, where she could have discovered a place to stay over night had she inquired, and she knew that her health was such that she might be seriously affected by the walk. Id.

lighten the consequential damages as much as he can by the use of ordinary care and diligence. This applies, in case of an expelled passenger, to the time and mode of traveling from the place of his expulsion to the station at which he was entitled to be set down. It applies also to fatigue, hardship, and injury to his health involved in reaching there.[6] A female passenger, who is carried past her destination to the next station, where accommodations may be obtained, cannot recover for mental and physical suffering caused by walking back to her destination in a bitterly cold night. The fact that she did not know that accommodations could be obtained does not excuse her, if she made no inquiry of the station agent.[7] So the failure

[6] Georgia R. & B. Co. v. Eskew, 86 Ga. 641, 12 S. E. 1061.

[7] Texas & P. Ry. Co. v. Cole, 66 Tex. 562, 1 S. W. 629. If the failure to make an effort to procure shelter or a conveyance is due to the passenger's negligence in not having money with him to pay therefor, it is for the jury to say whether the walk is the result of such negligence, rather than the proximate consequence of the removal from the cars. Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128, 155. Though a passenger is wrongfully ejected from a train at a station short of his destination, yet he cannot recover for the hardship sustained in a drive of 45 or 50 miles, begun late in the afternoon, not to his destination, but to a place away from the railroad, where he wished to inspect some land. Chicago, B. & Q. R. Co. v. Spirk (Neb.) 70 N. W. 926. One who is wrongfully ejected from a train at a station, and voluntarily leaves its shelter, and goes out and walks along the track, all night long, to his destination, in a storm, cannot recover for injuries caused by the exposure. Corrister v. Railroad Co., 25 Mo. App. 619. The fact that the driver of an omnibus compels a passenger to alight a mile from her residence on a cold winter's day, in the streets of a populous city, on the line of a street railway which passes close to her home, does not render the omnibus proprietor liable for a sickness from exposure to cold while walking home. Francis v. Transfer Co.,

of a railroad train to stop at a station, and take on a passenger, is not the proximate cause of the passenger's sickness, resulting from his walking to the next station on an extremely cold day, but such sickness must be regarded as the result of the willful and wanton act of the passenger, who could have waited for the next train, due in a few hours, or have safely prosecuted his journey by hiring a conveyance.[8] In a recent Indiana case, however, it is held that where a railroad company sets down a passenger at a place not her destination, and the passenger secures a team, and drives a distance of five miles to her destination, the court cannot say, as matter of law, that a sickness caused by the cold and exposure of the drive is due to her own negligence, or that it is not the proximate consequence of the company's negligence; and a finding by the jury that the company is liable will not be disturbed.[9]

5 Mo. App. 7. A passenger expelled at a point not a station cannot recover for an aggravation of a disease caused by a walk of six miles to his destination, where he might have walked back a quarter of a mile to the station at which he got on, or three-quarters of a mile to his own home, where he could have procured a conveyance. Chicago, R. I. & P. R. Co. v. Brisbane, 24 Ill. App. 463. A passenger who is ejected at a point not a station cannot recover, as part of his damages, for an aggravation of a disease caused by unnecessarily walking to his home, several miles, when the station at which he boarded the train was within a few minutes' walk of the point of ejectment. Ohio & M. R. Co. v. Burrow, 32 Ill. App. 161.

[8] Indianapolis, B. & W. Ry. Co. v. Birney, 71 Ill. 391.

[9] Pittsburgh, C., C. & St. L. Ry. Co. v. Klitch, 11 Ind. App. 290, 37 N. E. 560, disapproving Texas & P. Ry. Co. v. Cole, supra.

§ 121. SAME—DANGERS ENCOUNTERED FROM FAILURE TO CARRY TO DESTINATION.

If a railway carrier, instead of discharging a passenger at the place of destination called for by the contract of carriage, lands him at another place, from which he cannot reach the place of destination by any practicable route without encountering a serious danger, and the passenger, immediately thereafter, proceeding by the only practicable route to the place of destination, without fault or negligence on his part, encounters such danger, and is hurt, the hurt is a proximate consequence of the wrong done by the carrier.[1] Thus a passenger who is discharged at night at a place not his destination, and who, in walking to his destination by the only practicable route, falls into a ditch,[2] or a cattle guard,[3] or through a trestle,[4] of the existence of which he was ignorant, may recover from the railroad company for the injuries sustained in the fall.[5]

§ 121. [1] Winkler v. Railway Co., 21 Mo. App. 99.

[2] Houston & T. C. R. Co. v. Smith (Tex. Civ. App.) 32 S. W. 710.

[3] Winkler v. Railway Co., 21 Mo. App. 99; Evans v. Railway Co., 11 Mo. App. 463; New York, C. & St. L. R. Co. v. Doane, 115 Ind. 435, 442, 17 N. E. 913.

[4] Houston & T. C. Ry. Co. v. Devainy, 63 Tex. 172.

[5] A passenger was wrongfully compelled to leave the train in the dark, several hundred feet from the depot, and at a point where she was compelled to walk along a side track to reach a highway. The conductor knew that she would be compelled to cross a cattle guard, but of this fact she was ignorant. She fell into it, and was very much frightened by the placing of cars on the side track, while she was in the cattle guard; some of the cars approaching within 100 feet of her. Held, that the falling into the cattle guard, and the fright caused by the close approach of the cars, were the proximate

But a passenger who knows of the existence of the danger, and voluntarily chooses to encounter it, assumes the risk in getting off at the wrong place, without requesting to be set down at his destination.[6] This principle is illustrated in a Michigan case. A passenger was carried some distance past his station on a dark night, and on leaving the car he was misinformed by the conductor as to where he was. He was well acquainted with the locality, and walked southerly along the track to reach a highway, but after proceeding a short distance he discovered that he was already south of the highway, and retraced his steps. He walked carefully, because it was very dark, and he knew there was an open cattle guard on each side of the highway. When near the highway crossing, he was misled apparently by a visual deception, and moved forward under the supposition that the cattle guard, upon the brink of which he already stood, was some paces off; and this deception, combined with the slipping of his foot, caused him to fall into the pit. It was held that the wrong of the company in carrying

consequences of the wrongful act in failing to set her down at the depot. Stutz v. Railroad Co., 73 Wis. 147, 40 N. W. 653. A passenger on a freight train was compelled by the conductor to get off on the railroad right of way, a quarter of a mile from the station. A barbed wire fence prevented his getting off the right of way, and he started towards the station, walking near the train, until his progress was barred by a bridge, on which a flat car, forming part of the train, was standing. He climbed on the flat car, and, reaching its front end, he jumped to the ground, breaking both bones of his leg. Held, that it was for the jury to determine whether the carrier's breach of duty in not landing him at the station was the proximate cause of the injury. Adams v. Railroad Co., 100 Mo. 555, 12 S. W. 637, and 13 S. W. 509.

[6] Winkler v. Railway Co., 21 Mo. App. 99.

him past his destination, and misinforming him as to his whereabouts, was not the proximate cause of the injury.[7] So the act of a railroad company in carry-

[7] Lewis v. Railway Co., 54 Mich. 55, 19 N. W. 744. Cooley, C. J., said: "Before any injury had been sustained, the plaintiff discovered where he was, and started back for the road he had intended to take. Whatever danger there was to be encountered in the way was to be found in the cattle guard, and this he understood and calculated upon." "The injury was an event which happened unexpectedly and without fault. The defendant or its agents had not produced the deception or caused the foot to slip; and such wrong as defendant had been guilty of was in no measure connected with or related to the injury, except as it was the occasion for bringing the plaintiff where the accident occurred. It was after the plaintiff had been brought there that the cause of action unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of defendant, and its relation to the injury, would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he was approaching the cattle guard, the connection of defendant's wrong with the injury would have been precisely the same as appears here. But the proximate cause of the injury in the one case would have been the act of God; in the other, inevitable accident; but not more plainly accident than was the proximate cause here. Back of that cause in this case were many others, all conducing to bring the plaintiff to the place of the danger and the injury. The act of the defendant was the last of a long sequence, but, as between the causes which precede the proximate cause, the law cannot select one, rather than any other, as that to which the final consequence shall be attributed; and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless." A passenger, whose train had gone about 500 yards beyond his station, got off voluntarily, without being deceived by the conductor as to his whereabouts. In walking back to the station in the dark, he fell through a bridge. Held, that he could not recover, because by voluntarily getting off the train he waived the contract to be put off at the regular stopping place, and assumed the risk incident to getting

ing a six year old girl and her father to the station beyond the one to which it had agreed to carry them is not the proximate cause of an injury to the child, who, while walking back along the track, became frightened by the approach of an engine on a parallel track, broke away from her father, and ran in front of the engine.[8] Although a conductor is guilty of a wrongful act in requiring a female passenger, 16 or 17 years old, to get off the train, in the nighttime, before reaching her destination, a rape committed on her by a male passenger, who also left the train at that station, and who decoyed her into a saloon under the pretense of conducting her to an hotel, is not the direct and immediate consequence of the conductor's wrongful act, where it appears that such station is not an inappropriate or unsafe place for a youthful and inexperienced female, traveling alone, to remain between trains.[9] The negligence of a railroad company in carrying a passenger half a mile beyond her destination is not the proximate cause of an injury sustained from her manner of alighting, and not due to any defect in the place of alighting.[10]

off where he did. Gulf, C. & S. F. Ry. Co. v. Jordan (Tex. Civ. App.) 33 S. W. 690.

8 Benson v. Railroad Co., 98 Cal. 45, 32 Pac. 809.

9 Sira v. Railroad Co., 115 Mo. 127, 21 S. W. 905.

10 Texas & P. Ry. Co. v. Woods, 8 Tex. Civ. App. 462, 28 S. W. 416. Where a passenger rightfully on a train leaves it in obedience to the conductor's order, without any physical force being used, an injury sustained by the passenger by slipping as he is descending the car steps is not the proximate consequence of his wrongful removal from the car. Williamson v. Railway Co., 17 U. C. C. P. 615. Negligence in carrying a passenger beyond his station is not the proximate cause

§ 122. SAME—UNUSUAL CONSEQUENCES OF PERSONAL INJURIES.

As a general proposition, one who wrongfully inflicts a personal injury on another is liable for all the results on the human system produced by that injury, though such results do not at once fully manifest themselves. Thus, where a blow on the head produces a degeneration or impairment of health of the blood vessels of the brain, and finally one of the blood vessels is ruptured, causing paralysis, the paralysis, though not occurring until seven months after the injury, may be ascribed to it as the proximate cause.[1] Where pneumonia, caused by an injury received in the upsetting of a stage coach, has developed into an incurable disease of the lungs, such disease may be considered a proximate consequence of the injury.[2] Whether or not the failure of a railroad company to keep its station open, as required by statute, is the proximate cause of an illness of a passenger from exposure while standing on the platform, in inclement weather, wait-

of an injury sustained by the passenger in attempting to get off the train when it stopped on a bridge for the purpose of taking on water. Illinois Cent. R. Co. v. Green, 81 Ill. 19.

§ 122. [1] Bishop v. Railway Co., 48 Minn. 26, 50 N. W. 927. Where a blow received in a collision produces a bruise extending from a little below the lower rib to the shoulder blade, is followed by a swelling, afterwards by pleurisy, succeeded by consumption, from which the injured person dies 10 months after the accident, it is a question for the jury whether the death was the proximate consequence of the collision. Hurley v. Brewing Co., 43 N. Y. Supp. 259, 13 App. Div. 167.

[2] Shafer v. Gilmer, 13 Nev. 330.

ing for a delayed train, is a question for the jury.[3] It has even been held that where an injury inflicted by the negligence of another is so serious as to produce death without a surgical operation, and the injured person employs a competent and skillful surgeon, and dies as the result of the operation, the original injury is the proximate cause of the death, though the surgeon made a mistake of a nature which might have been made by the most skillful surgeon.[4]

Injuries to women, while traveling, have given rise to some conflicting decisions. It may now be taken as the settled doctrine that where a physical injury to a female passenger causes a miscarriage, the carrier is liable for the sickness and suffering resulting therefrom, though its servants were ignorant of the woman's condition at

[3] Boothby v. Railway, 66 N. H. 342, 34 Atl. 157. The negligence of a railroad company in failing to heat a mail train in the winter will render it liable for the sickness of a mail agent caused thereby, resulting in loss of the power of speech, unless his own negligence concurred in bringing on the illness. Turrentine v. Railroad Co., 92 N. C. 638. Where the failure of a sleeping-car company to properly heat its car brings on a violent cold, and produces permanent injury to plaintiff's eye, the question whether the injury to the eye is too remote as an element of damages is for the jury, and not the court. Hughes v. Car Co. (C. C. Mo.) 74 Fed. 499. If erysipelas springs from the injury, the danger of that disease, as well as the sufferings produced by it, constitute a portion of the injury itself. Houston & T. C. Ry. Co. v. Leslie, 57 Tex. 83.

[4] Sauter v. Railroad Co., 66 N. Y. 50, affirming 6 Hun, 446. "He would have died without the operation. Assuming that, by mistake of the surgeon, the operation was not successful, can it be justly said, in the first place, that the surgeon, and not the injury, killed him; and, in the second place, that the surgeon is to be regarded as a responsible intervening third person, within the rule referred to? There is no authority that supports such a proposition."

the time of the injury. "To hold otherwise would be to require every pregnant woman to refrain from travel, to take all the risk of negligence of public carriers, or to proclaim her condition to the servants of the carrier. We are not willing to sanction by our authority a rule that would so shock the delicacy, dignity, and sense of justice of our 'honorable women, not a few.'" [5] But in such a case damages cannot be recovered for loss of the unborn child.[6] Where injuries received by the sudden starting of a street car while a passenger is about to board it produces a premature birth a few days later, followed by tetanus, causing death, and there is evidence that tetanus, though comparatively rare, is one of the natural and probable consequences to be apprehended from childbirth and miscarriage, the question whether the injuries received in the street car were the proximate cause of the death is for the jury.[7] In this connection, a Colorado case at variance with these decisions should be noticed. A sleeping car caught fire on a bitterly cold night in January. A

[5] Mann Boudoir Co. v. Dupree, 4 C. C. A. 540, 54 Fed. 646. See, also, Sawyer v. Dulany, 30 Tex. 479.

[6] Butler v. Railroad Co., 143 N. Y. 417, 38 N. E. 454, reversing 4 Misc. Rep. 401, 24 N. Y. Supp. 142. "It is not in the interest of justice to extend the field of speculation in jury trials beyond the present limits, and to sustain the ruling in this case would go beyond what has hitherto been sanctioned by the courts."

[7] Brashear v. Traction Co. (Pa. Sup.) 36 Atl. 914. In this case it was said: "The causal connection was shown, and the continuity of effect was traced through the succession of events. No other cause of death was assigned. True, it was shown that the disease was caused by specific infection, but by the same witnesses it was shown that the miscarriage made the deceased especially liable to infection."

female passenger, scantily clad, and in stocking feet, on leaving the car, was compelled to stand for a minute or two on the platform. By reason of this exposure, she caught a severe cold, which caused the cessation of her menses, and resulted in a long period of illness. It was held that the exposure was not the proximate cause of the illness, because her condition at the time was an independent intervening cause, appertaining exclusively to herself, with which the railroad company had no concern, and to which it sustained no relation, either by contract or by the general duty imposed by law upon carriers of passengers.[8] This decision has been justly repudiated, as being, not only unsound in point of law, but as brutal and inhuman.[9] The physical condition of an injured person has never been regarded as an intervening cause which would shield the wrongdoer from the consequences of his wrongful act; and it would be surprising, indeed, if this decision were followed anywhere in the United States.

Suppose a personal injury undermines the vitality of the injured person, so that he becomes affected with

[8] Pullman Palace-Car Co. v. Barker, 4 Colo. 344.

[9] In Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911, the court says of this decision: "It, in effect, says that, if an individual unlawfully compels a sick and enfeebled passenger to expose himself to escape worse consequences from his wrongful act, he cannot recover damages from the wrongdoer, because it was his sick and enfeebled condition which rendered his exposure injurious. Certainly such a doctrine does not commend itself to those kinder feelings which are common to humanity, and I know of no other case which sustains its conclusions." In Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, it is said that the Colorado case is not sustained by authority, nor can it be supported on principle.

a contagious disease prevailing in the neighborhood, and he dies of that disease; is the injury the proximate cause of his death, so as to render the original wrongdoer liable therefor? This question has been answered in the affirmative.[10] A passenger, alighting from a train negligently stopped on a trestle, fell through the trestle. He was picked up in a delirious condition, suffering from a concussion of the brain and bodily injuries. These injuries and the shock to his nervous system put him in a condition favorable to take any disease prevailing in the community. He gradually drifted into malarial troubles, which were then rife in the neighborhood, and he died of malarial fever about six weeks after the injury was sustained. The death was held to be the proximate consequence of the injury, in analogy to the rule of the criminal law thus stated by Mr. Bishop: "Whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death follows, he will be deemed guilty of the homicide, though the person beaten would have died from other causes, or would not have died from this one had not others operated with it; provided the blow really contributed, either mediately or immediately, to the death in a degree sufficient for the law's notice." [11] So it has been held that the fact that a passenger, when injured, was suffering with pneumonia, and afterwards died of that disease, does not relieve the company from liability, if the injury so

[10] Terre Haute & I. R. Co. v. Buck, 96 Ind. 346.

[11] 2 Bish. Cr. Law, § 637. In Beauchamp v. Saginaw M. Co., 50 Mich. 163, 15 N. W. 65, a substantially similar ruling was made.

impaired her strength and vital forces as to render the disease incurable, when, without the injury, it would have yielded to treatment.[12]

§ 123. SAME—PREDISPOSITION TO DISEASE.

Though a person has a predisposition to disease, yet if an injury caused by defendant's negligence excites or develops the germs of disease, defendant is liable to the full extent of the injury.[1] The duty of care and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and, when that duty is violated, the measure of damages is the injury done, even though it might not have resulted but for the peculiar physical condition of the person injured, or may have been aggravated thereby.[2] A passenger injured by negli-

[12] Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 South. 902. It was further said in this case that the fact that a passenger, when injured in a railway accident, was suffering from an incurable disease, which would ultimately cause death, does not, as matter of law, relieve the company from liability, if the injuries hastened death. But see post, § 579.

§ 123. [1] Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 427, 3 N. E. 389, and 4 N. E. 908. Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages. Ohio & M. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. 297; Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 557, 9 N. E. 476.

[2] Lapleine v. Steamship Co., 40 La. Ann. 661, 4 South. 875. "Both on principle and authority, an injured person may recover compensatory damages for injuries sustained, although the wrongdoer did not know or could not foresee that the special or particular injury would be greater to the person upon whom the wrong was actually

gence of the carrier is entitled to recover the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury.[3] Thus the liability of a railroad company for a personal injury is not diminished by the fact that plaintiff was at the time suffering from a syphilitic disease, which aggravated the injuries sustained, or rendered them more difficult to cure.[4] So, where a cancer develops as the result of a blow on the breast of a female passenger by being thrown against the platform of a street car in an attempt to alight, the cancer properly forms an element of damages to be considered in awarding damages, though plaintiff was predisposed to that disease.[5] So where a blow on the head develops insanity, the fact that the injured person

inflicted than to one in full strength and robust health. A person, feeble or strong, young or old, is entitled to recover full compensation for the injuries actually sustained by the act of the wrongdoer." Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 567, 14 N. E. 572, and 16 N. E. 197. It is no defense to an action against a common carrier for injuries received by a passenger by reason of its negligence that the injuries would not have occurred, or would not have been so great, had the passenger been in good health. Owens v. Railway Co., 95 Mo. 169, 8 S. W. 350.

[3] Purcell v. Railway Co., 48 Minn. 134, 50 N. W. 1034.

[4] Brown v. Railroad Co., 66 Mo. 588. Though the damage done to a child by an injury appears to be aggravated by a latent hereditary hysterical diathesis, which had never exhibited itself before the accident, and might never have been developed but for it, the party in fault will be held for the entire damage as the direct result of the accident. Lapleine v. Steamship Co., 40 La. Ann. 661, 4 South. 875.

[5] Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74. "That the female plaintiff may have had a tendency or predisposition to cancer can afford no proper ground of objection. She, in common with all other people of the community, had a right to travel or be carried in

had a tendency to insanity will not relieve defendant from liability, though a blow on the head of a well person would not have produced that result.[6] And the right of a passenger to recover for an injury caused by the negligence of a railroad company is not impaired by the fact that he was afflicted with Bright's disease when injured.[7] So, where a person wrongfully on a train is ejected with unnecessary violence, the company is liable for aggravation of hernia, with which he had been suffering, though unknown to it, and though not cautioned by him in reference thereto.[8] So the aggravation and reopening of an old wound in a railroad accident, and the increased pain and medical attention necessitated thereby, may be taken into consideration by the jury in assessing damages.[9] Where a person already ill is injured through another's negli-

the cars of defendants, and she had a right to enjoy that privilege without incurring the peril of receiving a wrongful injury that might result in inflaming and developing the dormant germs of a fatal disease. It is not for the defendants to say that because they did not, or could not in fact, anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued. They must be taken to know, and to contemplate, all the natural and proximate consequences, not only that certainly would, but that probably might, flow from their wrongful act. The defendants must be supposed to know that it was the right of all classes and conditions of people, whether diseased or otherwise, to be carried in their cars, and it must also be supposed that they knew that a personal injury inflicted upon any one with a predisposition or tendency to cancer might, and probably would, develop the disease."

[6] Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568, 585.

[7] Louisville, N. A. & C. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284.

[8] Coleman v. Railroad Co., 106 Mass. 160, 179.

[9] Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 South. 363.

gence, additional expenses of the illness, which are caused by the injury, are an element of damages.[10]

But it has been held that plaintiff can recover only for such injuries as were sustained by reason of the accident in suit; and hence the fact that, at the time of such an accident, he had not recovered from other injuries, should be considered by the jury in mitigation of damages.[11] And in all cases the connection between the injury and the disease alleged to have been caused thereby must be shown. The court cannot assume that the injury caused or predisposed a person to disease, in the absence of evidence on this point. This principle is illustrated by a recent Louisiana case. A passenger, wrongfully expelled from a train at a way station, remained in the station house about an hour, and returned to the point of his departure in the caboose of a freight train. The night was cold, and, when he returned home, he complained of chilliness, and, two days later, of cold and indisposition. His ailment increased from day to day, and 17 days after his ejection he took to bed, ill with typhoid fever, then prevalent in the community, and he died of that disease. The medical expert testimony was that typhoid fever is caused by the reception of poison germs in the system, either by the air we breathe or the water we

[10] Emery v. Railroad (N. H.) 36 Atl. 367.

[11] Louisville & N. R. Co. v. Kingman (Ky.) 35 S. W. 264. Where a plaintiff, suing for permanent personal injuries, has Bright's disease of the kidneys at the time of the trial, and it appears that this disease was not caused by the injuries, that fact should be taken into consideration in determining his expectancy of life and loss of earning power. Bunting v. Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34.

drink, and that it could not be produced by exposure to cold, though the period of incubation might be affected thereby. It was held that the disease was not traced to the ejection, and the consequent exposure, as the proximate cause.[12]

§ 124. SAME—PECUNIARY LOSS.

As to pecuniary losses suffered by reason of a wrongful expulsion from the train, or of delay in transportation, the rule in Hadley v. Baxendale, heretofore stated,[1] has in the main been strictly applied. A passenger who has taken passage on a railway train, and who has failed to reach his destination because there was no connecting train at an intermediate station, may recover the expense he has been put to in order to arrive at his destination; but he cannot recover for loss of profits owing to his inability to keep his appointments with his customers, as these are too remote.[2] So, in an action for delay in the transportation of a theatrical manager and his troupe, he cannot recover for loss sustained through inability to give a performance as advertised, and for which tickets to the amount of $288 had been sold, and which amount he was compelled to refund, where the railroad company was ig-

[12] Randall v. Railroad Co., 45 La. Ann. 778, 13 South. 166. "We will not assume that the exposure was an inciting cause, without testimony connecting the disease, in its course, with such a disease as exposure may produce, or without the least showing that exposure had a lowering effect on the system, or predisposed him to take the disease."

§ 124. [1] Ante, § 119. As to damages for failure to carry to destination, for ejection, etc., see post, c. 36.

[2] Hamlin v. Railway Co., 1 Hurl. & N. 408.

norant of this fact at the time it undertook their transportation.[3] The loss of a job of work, occasioned by a passenger's expulsion from a train, and his delay at the station, is too remote to be considered as an element of damages.[4] And the fact that a passenger was compelled to borrow money to pay fare illegally exacted is too remote to afford a basis for the assessment of damages.[5] So wrongful imprisonment for one night is not the proximate cause of loss of earnings by plaintiff for nine months, resulting from his loss of employment.[6] But where a miner purchases a ticket to travel to his work by a train timed to start in ample time for that purpose, and he loses a day's work because of the nonarrival of the train, his loss of wages for that day is the proximate, and not the remote, consequence of the delay, and he may recover the amount of his wages from the railroad company.[7]

Where a passenger is wrongfully removed from a train, but without any more force than is necessary, the loss of a pair of race glasses, which he left behind him when removed, is not the natural or probable consequence of defendant's act, since, if he had applied to be allowed to get the glasses, or asked one of the passengers to hand them to him, this would have been done.[8]

[3] Georgia R. R. v. Hayden, 71 Ga. 518.

[4] Carsten v. Railroad Co., 44 Minn. 454, 47 N. W. 49, citing Brown v. Cummings, 7 Allen (Mass.) 507.

[5] Hoffman v. Railway Co., 45 Minn. 53, 47 N. W. 312.

[6] Carpenter v. Railroad Co., 13 App. Div. 328, 43 N. Y. Supp. 203.

[7] Cooke v. Railway Co., 57 J. P. 388.

[8] Glover v. Railway Co. (1867) L. R. 3 Q. B. 25.

CHAPTER X.

CONTRIBUTORY NEGLIGENCE.

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§ 125. THE COMMON-LAW DOCTRINE.

At common law, actionable negligence on defendant's part does not render him liable for injuries to plaintiff, if there is contributory negligence on plaintiff's part. But contributory negligence is no defense to a willful or wanton wrong.

"It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened, except for the culpable negligence of the party injured, concurring with

that of the other party, no action can be maintained." [1] Though this rule is said to have obtained from time immemorial, its first definite formulation, as a part of the common law, is as recent as the year 1809. In Butterfield v. Forrester,[2] decided in that year, which was an action for injuries sustained by running into an obstruction in a highway, Lord Chief Justice Ellenborough, in a remarkably terse and lucid charge to the jury, said: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action,—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." [3] This doctrine of contributory negligence prevails in all the states of the American Union,[4]

§ 125. [1] Black, J., in Railroad Co. v. Aspell, 23 Pa. St. 147.

[2] 11 East, 60.

[3] A case decided in New Jersey two years before Butterfield v. Forrester is based on the same principle. Defendant had taken plaintiff's flat from his ferry on the Delaware river, and plaintiff, being obliged to search for the flat in order to cross the river, left his wagon and horses on the beach. While he was gone, the horses ran into the river, and were drowned. It was held that defendant was not liable for the value of the horses, because it was plaintiff's own negligence to leave them without first securing them. Gorden v. Butts (1807) 2 N. J. Law, 242.

[4] It is well settled at common law, whatever doubts may exist as to the justice of the rule, that the party who claims damages for the neglect of duty of others to exercise proper care cannot recover if it appears that the injury he sustained was in any degree caused by his own negligence or want of proper care. Murch v. Railroad Corp., 29 N. H. 9. One seeking to recover for injuries occasioned by the negligence of another must be shown to be free from negligence contributing in any degree to occasion the injury complained of. Gonzales v. Railroad Co., 38 N. Y. 440. One who has by his own negli-

though in some it has been considerably modified by statute.[5] Even in Louisiana, the jurisprudence of which is founded on the civil, rather than the common, law, it is well settled that contributory negligence on the part of the plaintiff is a bar to a recovery, although defendant be in fault.[6]

This principle of contributory negligence does not rest on the idea that one wrong sets off the other, or that one justifies the other. It is founded on the broader ground that, when the negligence of the plaintiff has contributed proximately to the injury, the damage is considered of his own producing, and it is difficult, if not impossible, to determine the quantum of injury which resulted from the defendant's tortious or negligent conduct. It is not that, in such case, defendant has done no wrong. His dereliction of duty may be so patent as to render it morally certain that, without such dereliction, the injury would not have resulted. This is not the test; for it is equally true, in cases of proximate contributory negligence, that without the plaintiff's fault the injury would not have resulted. To allow such plaintiff to recover would be to permit a recovery for the proximate consequences

gence contributed to an injury of his person cannot recover damages from another person, who has also been guilty of a negligent act which concurred in producing the injury. Florida South. Ry. Co. v. Hirst, 30 Fla. 1, 11 South. 506. Among the leading cases in this country are Robinson v. Cone, 22 Vt. 213; Railroad v. Norton, 24 Pa. St. 469.

[5] See post, c. 13.

[6] Odom v. Railroad Co., 45 La. Ann. 1201, 14 South. 734, and cases cited; Hanson v. Transportation Co., 38 La. Ann. 111; Summers v. Railroad Co., 34 La. Ann. 139.

of the plaintiff's own negligence.[7] Hence, if the plaintiff's fault, of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong.[8]

§ 126. WILLFUL INJURIES.

The doctrine of contributory negligence is applicable only to cases where it is sought to hold defendant liable on the ground that he has been guilty of negligence. Contributory negligence is no defense to an action for

[7] Memphis & C. R. Co. v. Copeland, 61 Ala. 376; Alabama Great South. R. Co. v. Hawk, 72 Ala. 112. It would certainly be very unjust to allow a person who has sustained an injury by the negligence of another to recover damages for such injury when it is made to appear that he himself contributed by his own negligence to the cause of such injury, or when, by proper care on his part, he might have avoided it altogether. This would, in effect, be giving one compensation for his own default, and would amount to the offer of a premium for negligence or want of proper care of one's own person. Darwin v. Railroad Co., 23 S. C. 531.

[8] Little v. Hackett, 116 U. S. 366, 371, 6 Sup. Ct. 391. "In order that a man's negligence may entitle another to a remedy against him, that other must have suffered harm whereof this negligence is a proximate cause. Now I may be negligent, and my negligence may be the occasion of some one suffering harm, and yet the immediate cause of the damage may be not my want of care, but his own. Had I been careful, to begin with, he would not have been in danger; but had he, being so put in danger, used reasonable care for his own safety, or that of his property, the damage would not have happened. Thus, my original negligence is a comparatively remote cause of the harm, and, as things turn out, the proximate cause is the sufferer's own fault, or rather (since a man is under no positive duty to be careful in his own interest) he cannot ascribe it to the fault of another. In a state of facts answering this general description, the person harmed is, by the rule of the common law, not entitled to any remedy." Pol. Torts (Webb's Ed.) p. 566.

a willful wrong.[1] Thus the doctrine of contributory negligence has no application to an action for an unlawful and forcible ejection of a passenger from a train by the servants of a railway company.[2] Such ejection is an intentional and willful assault,[3] and no degree of carelessness on the part of an assaulted person furnishes any excuse for an unlawful invasion of the right of personal security.[4] So, in an action for injuries to a trespasser riding under a freight car, who was pushed from the train while in motion by one of the company's servants, the fact that he may have been guilty of negligence in riding in a perilous position is no defense.[5] But the omission of a railroad company to prepare a station house for the comfort of its passengers, or to have the place lighted up, does not constitute such wanton or willful negligence as to overcome the defense of contributory negligence in an action by a passenger waiting for a train at a station, who stepped on the track in front of a moving locomotive, plainly visible had he looked.[6]

§ 126. [1] Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 9 South. 303; Highland Ave. & B. R. Co. v. Winn, 93 Ala. 306, 9 South. 509; Indiana, B. & W. Ry. Co. v. Burdge, 94 Ind. 46. Where both parties act willfully, neither party would probably be entitled to recover; as, for example, where the drivers of two vehicles headed towards each other intentionally drive into each other, or where two persons voluntarily engage in an assault and battery on each other.

[2] Louisville, N. A. & C. Ry. Co. v. Goben, 15 Ind. App. 123, 42 N. E. 1116, and 43 N. E. 890.

[3] Sanford v. Railroad Co., 23 N. Y. 343, reversing 7 Bosw. 122.

[4] Chicago, St. L. & P. R. Co. v. Bills, 118 Ind. 221, 20 N. E. 775.

[5] Thurman v. Railroad Co. (Ky.) 34 S. W. 893.

[6] Chewning v. Railway Co., 100 Ala. 493, 14 South. 204.

§ 127. DEFINITION.

Contributory negligence may be defined to be the want of ordinary care on the part of the plaintiff, which, concurring or co-operating with defendant's negligence, produced the injury complained of as a proximate cause.[1]

The two essential elements of contributory negligence are (1) plaintiff's want of ordinary care; and (2) connection between that and the injury as a proximate cause.[2]

It is proposed to take up (1) the subject of want of ordinary care on the part of a normal adult passenger; (2) variations of the rule in favor of passengers under

§ 127. [1] Contributory negligence consists, in contemp'ation of law, in such acts or omissions, on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent acts of defendant, are a proximate cause or occasion of the injury complained of. Richmond & D. R. Co. v. Pickleseimer, 85 Va. 798, 10 S. E. 44; International & G. N. R. Co. v. Garcia, 75 Tex. 583, 13 S. W. 223; Beach, Contrib. Neg. § 3.

[2] In Baltimore & P. R. Co. v. Jones, 95 U. S. 439, it is said: "One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such case is entitled to no relief. But where defendant has been guilty of negligence also in the same connection, the result depends upon the facts. The question in such cases is: (1) Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case, the plaintiff is entitled to recover; in the latter, he is not." See, also, to same effect, Richmond & D. R. Co. v. Morris, 31 Grat. (Va.) 200.

disability; (3) the subject of proximate cause; (4) variations from the common law in different jurisdictions.

§ 128. DEGREE AND STANDARD OF CARE.

Unlike the carrier, the passenger need not exercise the highest degree of care and skill for his own safety. The passenger is bound to exercise only ordinary care and prudence to preserve himself from injury.[1] "The principle that one who has himself used reasonable care, but has, notwithstanding, suffered an injury from the negligence of another, should have redress for that injury, is so obviously just that it carries with it its own vindication." [2]

The standard by which to determine whether or not a normal adult passenger has failed to exercise this degree of care is the conduct of a prudent, reasonable man in possession of his ordinary senses and capacities, placed in plaintiff's situation.[3] "It is certainly very vague and uncertain to make proper care vary

§ 128. [1] Mackoy v. Railway Co., 18 Fed. 236; Smith v. Railway Co., 32 Minn. 1, 18 N. W. 827; Keokuk North. Line Packet Co. v. True, 88 Ill. 608; Bland v. Railroad Co., 65 Cal. 626, 4 Pac. 672.

[2] Huelsenkamp v. Railway Co., 37 Mo. 537.

[3] Simms v. Railway Co., 27 S. C. 268, 3 S. E. 301. Whether or not the act of a person is negligent depends on whether or not a person of "ordinary prudence" would have done, or omitted to do, the same thing. Galloway v. Railway Co., 87 Iowa, 458, 54 N. W. 447. The test of the liability of one to a charge of contributory negligence is whether a prudent person in the same situation, and having the knowledge possessed by the one in question, would do the alleged negligent act. Texas & P. Ry. Co. v. Best, 66 Tex. 116, 18 S. W. 224. See, also, Curtis v. Railroad Co., 27 Wis. 158.

with the varying capacities and infirmities of men. When the rights and obligations of one party are made to turn upon the proper caution of another, it would seem that there should be some common standard by which to test the fact, and we know of none practicable, other than that of a prudent, reasonable man in the possession of the ordinary senses and capacities." [4] Where, however, the passenger belongs to a class under a recognized disability,—a child, for example,—a different rule obtains.[5]

In conclusion, it should be stated that the relative functions of court and jury in deciding the question of contributory negligence are the same as their functions on the subject of defendant's negligence.[6]

§ 129. DUTY TO USE SENSES AND ASCERTAIN FACTS.

A man may be negligent in ascertaining his surroundings, no less than in his conduct with respect to a known situation. Of course, plaintiff's previous knowledge, or want of knowledge, of his surroundings is a material circumstance to be considered by the jury in determining the question of contributory negligence, but it is not the only circumstance to be considered. Whether or not he had any past experience of the dangers of the situation, he is bound to exercise his senses. He must use his eyes and ears, and exercise the care and prudence which a man of ordinary care

[4] Renneker v. Railway Co., 20 S. C. 219.

[5] See post, § 183.

[6] See ante, § 28.

and prudence would be expected to use in the same circumstances to avoid accident.[1] Such care and prudence may require more or less exercise of the senses, as the situation and surroundings vary. In some instances a person of ordinary prudence would give but little heed to the things surrounding him; while in others, where danger is quite apparent, he would exercise a much higher degree of diligence to avoid danger. The extent to which one's faculties must be exercised to constitute ordinary care depends on the particular surroundings.[2] Thus a passenger at a station, who is perfectly acquainted with the location of the tracks, is guilty of contributory negligence, as matter of law, in "unconsciously" or "inadvertently" stepping on the track, right in front of a slowly moving locomotive, which could have been seen by him at any time while within 200 feet of the track.[3] So, where a passenger has knowledge of the presence of a pile of lumber on a station platform, and that there is sufficient room to pass between the lumber and the edge of the platform,

§ 129. [1] Illinois Cent. R. Co. v. Davidson, 12 C. C. A. 118, 64 Fed. 301. A passenger who unnecessarily and negligently exposes himself to danger after alighting from a train, by walking between tracks, is guilty of contributory negligence, which precludes recovery for injuries sustained by being caught between trains on both tracks, even though he did not know of the dangers to which he exposed himself while so walking. Id.

[2] Prothero v. Railway Co., 134 Ind. 431, 33 N. E. 765. A person who enters a transfer car two feet above the surface of the street, and used as a waiting room for passengers on street cars, is not justified in closing eyes and ears to the natural and ordinary use of the premises, and in leaning against a door liable to be opened towards the outside at any moment, thus permitting her to fall. Id.

[3] Chewning v. Railway Co., 100 Ala. 493, 14 South. 204.

his mere forgetfulness of, or inattention to, this fact, while passing along the platform in the nighttime, on his way to the train, constitutes contributory negligence as matter of law, which will preclude him from recovering for injuries sustained in stumbling over the lumber.[4] But the mere fact that a street car was stopped during a trip, and that a trap door in the rear platform was raised, is not notice to a passenger that the trapdoor was defective, so as to charge her with contributory negligence in passing over the door in alighting from the car.[5]

When, however, a person has been duly careful to ascertain his surroundings, his conduct must be tested by the facts as they appear to him, not as they really are,—in other words, he is not bound to see. He is bound to make all reasonable efforts to see that a careful, prudent man would make in like circumstances. He is not to provide against any certain result. He is to make an effort for a result that will give safety,—such an effort that care, caution, and prudence would dictate.[6]

§ 130. RELIANCE ON CARRIER.

A passenger on a railroad train has a right to confidently rely on the care and watchfulness of the carrier to make all things safe for his transportation, with its necessary incidents. While passively submitting

[4] Wood v. Railroad Co., 100 Ala. 660, 13 South. 552. This decision is doubtful. See post, § 132.

[5] Washington v. Railway Co., 13 Wash. 9, 42 Pac. 528.

[6] Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 299, 10 South. 130; Greany v. Railroad Co., 101 N. Y. 419, 5 N. E. 425.

himself to his care during the journey, or while entering upon or leaving its cars in the usual place and ordinary time and manner, he is not to be deemed guilty of negligence, unless knowledge of a defect or peril is thrust upon him, and he then fails to use ordinary care to avoid injury.[1] Thus a passenger walking along a station platform in the nighttime has a right to rely, within reasonable limits, on the presumption that the company has done its duty, and that the platform is safe; and he may recover for injuries sustained from falling into a hole which he did not see.[2] So, where a bridge has become dangerous for the passage of cars, and the company requires passengers to change cars, and walk across it, a passenger is not guilty of contributory negligence, as matter of law, in making the attempt in the nighttime, without calling for a light, since she had a right to presume that the carrier would do its duty to make the passage safe.[3] A passenger on a stagecoach, with knowledge that it is not provided with lights, does not take the risk of accidents arising from the failure to provide lights.[4]

But while one may, in the exercise of reasonable care, rely, to a certain extent, upon the performance of his duty by the other, no negligence of such other can

§ 130. [1] Ohio & M. Ry. Co. v. Stansberry, 132 Ind. 533, 32 N. E. 218.

[2] Louisville, N. A. & C. Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968.

[3] Jamison v. Railroad Co., 55 Cal. 593.

[4] Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125. "Unless the instrumentalities provided by the carrier are so glaringly defective as to make it apparent to every prudent person that they are insufficient, and that the journey could not be undertaken with safety, the passenger may rely on the care and foresight of the carrier."

be so dominant as to relieve him from his own obligation; and, if a performance of such obligation might have prevented the injury, his failure so to perform must be considered as contributory thereto.[5]

§ 131. SAME—ON CARRIER'S SERVANTS.

A passenger may safely rely on the judgment of those placed in charge of the train, where it is not plainly open to his observation that that reliance will expose him to danger that a prudent man would not incur; but he cannot rely on their judgment where it would expose him to a risk that a reasonably prudent man would not assume.[1] Thus where an empty car is apparently coupled to a train, and the conductor cries out, "All aboard!" a passenger who, in the dark,

[5] Hinckley v. Railroad Co., 120 Mass. 257.

§ 131. [1] Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, and 14 N. E. 352. "First. Advice or direction given to a passenger by conductors or others in the management of vehicles and railroad trains, even though plain and unambiguous, cannot be held to excuse an act of negligence on the part of an adult passenger which would be so apparent to common prudence as to make it an obvious act of recklessness or folly. Second. Where the act advised to be done is one where the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor or manager in the line of his ordinary duties, it becomes the province of the jury to say how far the plaintiff's negligence may be excused." South & N. A. R. Co. v. Schaufler, 75 Ala. 136. See, also, Irish v. Railroad Co., 4 Wash. 48, 29 Pac. 845, and cases cited; Davis v. Railway Co., 69 Miss. 136, 10 South. 450; Maher v. Railroad Co., 67 N. Y. 52, affirming 7 N. Y. Super. Ct. 155. As to direction to board moving train, see post, § 154. As to direction to ride in dangerous place on train, see post, § 171.

proceeds to this empty car for a seat, is not chargeable with contributory negligence in failing to notice that the coupling had not been effected, and that the cars were several feet apart, by reason of which she fell into the opening.[2] So, where the conductor notifies a shipper of stock that his cattle are down, and that he had better look after them, the shipper is justified in believing that there is no danger from passing trains while so doing; and his failure to watch, in the dark, for an approaching train, while engaged in getting cattle up, does not bar a recovery for injuries sustained in being struck by such a train while at work.[3]

[2] Lent v. Railroad Co., 120 N. Y. 467, 24 N. E. 653, affirming 54 N. Y. Super. Ct. 317. See, also, to same effect, Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219; Id., 11 Ill. App. 386.

[3] Fowler v. Railroad Co., 18 W. Va. 579. See, also, Chicago & A. R. Co. v. Rayburn, 52 Ill. App. 277. A passenger making a transfer from one street car to another, pursuant to the directions of the driver, has a right to assume that an opportunity will be given him to make the change in safety, or that he will be notified of any apparent danger foreseen by the employés who are at the point of danger, and he need not be on his guard against being run into by another car while he is making the transfer in plain view of the driver. Citizens' St. R. Co. v. Merl, 134 Ind. 609, 33 N. E. 1014. If, in obedience to the direction of the carrier's servant, a passenger, standing in a safe place, where injury would not have occurred, moves to another part of the car, unaware of the fact that the place is unsafe, the company is liable for an injury received by reason of assuming such position; and, in the absence of apparent danger, the passenger has the right to assume that the place to which she is directed is safe. Prothero v. Railway Co., 134 Ind. 431, 33 N. E. 765. A passenger is not guilty of contributory negligence in obeying the conductor's direction as to the method of getting on the car; and such obedience does not bar him from recovering for injuries sustained by the unexpected starting of the engine. Irish v. Railroad Co., 4 Wash. 48, 29 Pac. 845. A passenger by mistake on a wrong train, who voluntarily leaves it

Where passengers, expecting to take a river steamer, are at the appointed place for embarking, with no fences or gates to keep them back, they must generally have a right, if they do so in good faith, to assume that no dangerous orders will be given, and that they may safely act on the directions of officers to jump a distance of 20 inches from the dock to the gangway of the steamer. Some allowance must also be made for such conditions as stand in the way of full deliberation. It is applying too harsh a rule to hold that persons who have apparently but a few moments to decide between following the directions of the officers, and losing their last chance for passage, should be held to be negligent in doing as they are invited to do, unless the danger is very obvious.[4]

But the negative side of the rule—that the passenger cannot rely on the judgment of the carrier's servants when it is obviously dangerous to do so—must also be borne in mind. Thus a railroad employé, carried on a construction train to and from his place of work, is guilty of contributory negligence, as matter of law, in riding on the pilot of the locomotive, when there is room on a box car, and he cannot recover for injuries sustained in a collision, even if he occupied his perilous position with the knowledge, or by the direction, of

some distance from the station, is not guilty of contributory negligence in obeying the conductor's direction to walk back to the station on the track; and a recovery may be had for his death, caused by being struck by another train on a trestle, of the existence of which he was ignorant when he undertook to walk back. Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, and 14 N. E. 352.

[4] Clinton v. Root, 58 Mich. 182, 24 N. W. 667.

the foreman. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track in front of the advancing wheels of the locomotive.[5]

§ 132. USE OF STATION PLATFORM—KNOWLEDGE OF DEFECTS.

A passenger at a railroad depot waiting for his train is not bound to remain in the waiting room until it arrives, nor is he guilty of negligence in going on the platform before it becomes necessary to board the train, so as to preclude recovery for an injury sustained by being run into by a baggage truck.[1] Neither does the mere knowledge of a passenger that a station platform is in a defective condition render him guilty of negligence in using the platform; nor is he bound to keep the knowledge of its defective condition constantly in mind, since the presumption is that the company will do its duty and repair the defect.[2] All that can be required of him is that he should exercise ordinary care and prudence in using the platform.[3] Neither is a passenger alighting from a train in the daytime guilty of contributory negligence, as matter of law, in failing to be on the lookout for a hole in the station platform, since he has a right to rely on the carrier's care and watchfulness, and it must appear that he knew of the defect, and failed to use ordinary

[5] Baltimore & P. R. Co. v. Jones, 95 U. S. 439.

§ 132. [1] Chicago & A. R. Co. v. Woolridge, 32 Ill. App. 237.

[2] Pennsylvania Co. v. Marion, 123 Ind. 415, 23 N. E. 973.

[3] White v. Railway Co., 89 Ky. 478, 12 S. W. 936.

care to avoid injury, before he can be said to be guilty of contributory negligence as matter of law.[4] So the question whether a passenger is guilty of negligence in passing over a sloping part of a station platform in going to a train, instead of going down steps,—there being ice and snow on the platform,—is one for the jury, under all the evidence.[5]

But a passenger getting off at a station in the nighttime has no right to assume that the station is entirely free from obstructions, such as mail bags thrown from the train; and is chargeable with contributory

[4] Ohio & M. R. Co. v. Stansberry, 132 Ind. 533, 32 N. E. 218. A train was stopped in such a position that the forward end of a passenger car was opposite a baggage truck, 37 feet long and 7 feet wide, with its top on a level with the car platform. A number of passengers got off at the forward end of the car, all stepping on the truck, including plaintiff. Supposing the truck to be the regular station platform, she walked along it, as others before her were doing, without looking to see where she was walking, and after taking two or three steps she fell off the truck. Held, that it could not be said, as matter of law, that she was negligent in getting off from the front platform upon the truck, instead of going back upon the rear platform, nor in failing to carefully scrutinize the floor of what she supposed was the station platform before beginning to walk forward on it. Bethmann v. Railroad Co., 155 Mass. 352, 29 N. E. 587.

[5] Rathgebe v. Railroad Co. (Pa. Sup.) 36 Atl. 160. A passenger was injured by falling on steps leading to defendant's railway station, which were worn and hollowed, and covered by a light layer of snow, trodden down and frozen over. Held, that the mere facts that the passenger knew the stairway was dangerous, that he could have taken another stairway which was safe, and that he went down carefully, holding the hand rail, are not sufficient to show that, with full knowledge of the nature and extent of the risk he ran, he impliedly agreed to incur it, and that therefore the maxim, "Volenti non fit injuria," was not applicable. Osborne v. Railway Co., 21 Q. B. Div. 220.

negligence in failing to observe such bags before stumbling over them, where there is sufficient light to enable her to do so.[6] And a passenger waiting for a train, who leaves a comfortable waiting room and well lighted passenger platform, and saunters forth into the darkness and onto the freight platform, at the opposite side of the station, without giving any heed to timbers, pieces of plank, sewer pipe, shingles, and dirt which impede his progress, is guilty of contributory negligence, as matter of law, which will bar a recovery for injuries sustained in falling into a pit dug by the railroad company in its freight platform.[7] A passenger alighting from the train at a meal station, who attempts, under circumstances fully apprising him of the risk, to reach the eating house by passing so close to the baggage car, while the baggage is being unloaded, as to be injured by a trunk falling on his foot, is guilty of negligence, though the passage he chooses to select is used by passengers; there being another path to the eating house as convenient and direct, free from all risk or obstruction, provided by the company for passengers to reach the eating house.[8]

§ 133. USING UNLIGHTED PREMISES.

A passenger is not, as matter of law, guilty of contributory negligence in walking along an unlighted platform in the nighttime, to see whether there is another coach on the rear end of the train he is about to

[6] Sargent v. Railway Co., 114 Mo. 348, 21 S. W. 823.
[7] Gunderman v. Railway Co., 58 Mo. App. 370.
[8] Duvernet v. Steamship Co. (La.) 21 South. 644.

board.[1] So, though a passenger might have observed, when arriving at a station in daylight, that the platform at one end is three feet above the ground, the failure to bear this fact in mind does not convict her of contributory negligence, as matter of law, which will bar a recovery for injuries sustained in falling from the platform in the nighttime, while waiting for a delayed train.[2] The question whether a passenger is guilty of contributory negligence at a station with which he is well acquainted, in walking across the platform obliquely in the nighttime, and thus missing the steps, instead of going straight ahead, is for the jury.[3]

But the unexplained failure of a passenger, on leaving a station in the nighttime, to use lighted stairs, and passing into utter darkness in search of another pair of stairs, is prima facie evidence of negligence on

§ 133. [1] Buenemann v. Railway Co., 32 Minn. 390, 20 N. W. 379.

[2] Missouri Pac. Ry. Co. v. Neiswanger, 41 Kan. 621, 21 Pac. 582. It is for the jury to determine whether a person accompanying an intending passenger to the station, who goes on the platform at a place where it is nearly level with the ground, is guilty of contributory negligence in attempting to step from it in the dark at a place four feet above the ground, where she testifies that she looked, and thought the ground near enough to be reached by a step. Missouri, K. & T. Ry. Co. v. Turley (Indian Ter.) 37 S. W. 52.

[3] Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 4 South. 359. A passenger descending a dark stairway at an elevated station, who has carefully felt her way until she thought she was at the bottom, is not chargeable with negligence, as matter of law, in stepping out as though the bottom had been reached; but it is a question for the jury whether she should have continued to feel her way until she touched the ground. Flagg v. Railway Co., 49 N. Y. Super. Ct. 251.

his part.[4] So a passenger at a station, who knows that his train is approaching, and who walks away from the light to the point where he thinks the baggage car will stop, and who in so doing steps off the edge of the platform in the dark, and is struck by the engine, is guilty of contributory negligence as matter of law.[5] So a passenger alighting on a crowded station platform in the nighttime is guilty of contributory negligence in pressing through the crowd, and walking off the edge of the platform, after being warned of the danger by a railroad official.[6] A passenger who, on a dark night, instead of walking along the platform to a highway, voluntarily steps off the side of the plat-

[4] Bennett v. Railroad Co., 57 Conn. 422, 18 Atl. 668. A passenger who, on alighting from a train in the nighttime, inquires of a mere stranger for a privy, instead of some railroad employé, and who goes in the direction indicated, beyond the depot platform, and falls over a steep bluff, is guilty of contributory negligence, and cannot raise the question whether it is the duty of the company, independent of statute, to keep such accommodation lighted and visible, so that a passenger can, without danger, find it. Montgomery & E. Ry. Co. v. Thompson, 77 Ala. 448.

[5] Bradley v. Railway Co. (Mich.) 65 N. W. 102.

[6] Missouri Pac. R. Co. v. Texas & P. Ry. Co., 33 Fed. 359. A female passenger, leaving a train late at night, was shown by the light of a lamp up the steps of the platform into the reception room of the depot. She declined going to an hotel, and announced her intention to wait at the depot for another train, to arrive early next morning. While the platform lamp was being trimmed in her presence, she hurriedly walked out upon the platform, and, without taking the precaution to inquire or ascertain whether or not she could safely do so, turned at right angles from the lighted reception room, and walked in the dark to the end of the platform, where she fell off, and was injured. Held, that she was guilty of contributory negligence. Reed v. Axtell, 84 Va. 231, 4 S. E. 587.

form next the track, with the intention of going obliquely to the highway, and without doing anything to ascertain what would be found on stepping off the platform, is guilty of contributory negligence, and cannot recover for injuries sustained in stepping into a cattle guard.[7]

§ 134. STANDING NEAR EDGE OF STATION PLATFORM.

A passenger on a platform erected by the company for the accommodation of passengers is not chargeable, as matter of law, with knowledge that passing trains may project a few inches over the edge of the platform; and the question whether he is guilty of contributory negligence in standing near the edge, where he was struck by a train, is one of fact for the jury.[1] So a passenger is not, as matter of law, guilty of contributory negligence in walking along the edge of the platform, near a railroad track, in the direction of his train, without looking to see whether a train is approaching him from behind, since he has a right to rely to some extent upon the giving of proper and usual signals of danger, or other suitable warning, in case of the approach of a train; and he may recover

[7] Forsyth v. Railroad Co., 103 Mass. 510.

§ 134. [1] Dobiecki v. Sharp, 88 N. Y. 203. A passenger has a right to regard the platform as a safe and proper place; and, where he is ignorant of the existence even of a track near the edge of the platform, he is not chargeable with negligence in standing so near the edge as to be struck by an incoming train, running at a high rate of speed, which swept a portion of the platform. Archer v. Railroad Co., 106 N. Y. 589, 13 N. E. 318.

for injuries sustained by being struck by a projecting step on a train, which gave no signal of its approach.[2]

But in Pennsylvania it has been held that a person at a railroad station at night, who is warned of the approach of his train, who leaves the station to take it, and who could have heard it and seen its headlight for a long distance, is guilty of contributory negligence, as matter of law, in walking so near the edge of the platform as to be struck by the locomotive.[3] And a passenger, waiting for his train, who stands so near the edge of a freight platform as to be struck by an engine, is guilty of contributory negligence, as matter of law, where he would have been perfectly safe had he remained on the platform intended for passengers.[4]

[2] Sonier v. Railroad, 141 Mass. 10, 6 N. E. 84. One who is rightfully on the platform at a station is not guilty of contributory negligence in failing to look out for an approaching locomotive, the bumpers of which projected 18 inches over the edge of the platform, and struck the plaintiff. Langan v. Railway Co., 72 Mo. 392. A person lawfully on a platform at a station, who hears a train approaching, and who then moves to the middle of the platform, where he would be safe from trains of ordinary width, is not guilty of contributory negligence in failing to notice that the train is one of a peculiar build, having brake wheels projecting 14 inches from the car; and he may recover for injuries sustained by being struck by one of them. Sullivan v. Railroad Co., 39 La. Ann. 800, 2 South. 586. A passenger waiting for a car in a depot, at the terminus of a street-railroad line, is not bound to anticipate the shifting of the car from one track to another by a side movement, and is not chargeable with negligence in standing so near the movable platform as to be injured by the shifting, in the absence of all warning by the employés, or of any knowledge of the structure for shifting the cars. Gordon v. Railroad Co., 40 Barb. (N. Y.) 546.

[3] Pennsylvania R. Co. v. Bell, 122 Pa. St. 58, 15 Atl. 561.

[4] Matthews v. Railroad Co., 148 Pa. St. 491, 24 Atl. 67. Where a

§ 135. STANDING BETWEEN CAR TRACKS.

It is contributory negligence, as matter of law, for a person to stand between two street-car tracks, and to board a street car in that situation, when he sees another car approaching on the other track, which strikes him just as he is about to get on board.[1] So it is negligence, as matter of law, for a person intending to take a cable car to deliberately stand, after dark, between double tracks, so near together that cars going in opposite directions pass within two feet of each other, and in that situation wait for, and attempt to take passage on, cars coming on one track, without paying any attention as to whether cars are approaching within dangerous proximity on the other track.[2]

railroad company has provided a safe platform for passengers at its station, a passenger who stands on the baggage platform, on the opposite side of the track, which is so narrow as not to admit of his standing between it and an approaching train, is guilty of contributory negligence which bars an action for his death. Little Rock & Ft. S. Ry. Co. v. Cavanesse, 48 Ark. 106, 2 S. W. 105.

§ 135. [1] Davenport v. Railroad Co., 100 N. Y. 632, 3 N. E. 305; Halpin v. Railroad Co., 40 N. Y. Super. Ct. 175. But in an earlier case it was held that it is not necessarily negligence for a person to endeavor to board a street car on the side next to a parallel track, so as to bar a recovery for injuries sustained by reason of the starting of the car, dragging him along until he is struck by a car on the adjoining track. Dale v. Railroad Co., 1 Hun, 146, affirmed in 60 N. Y. 638.

[2] Miller v. Railway Co., 42 Minn. 454, 44 N. W. 533. One who mounts a street car between parallel tracks, without looking to see whether another car is coming, cannot recover for injuries sustained in being struck by the other car. Schreiner v. Railroad Co., 5 Mo. App. 596.

A passenger, standing between two street-car tracks, is guilty of contributory negligence in stepping back on one of the tracks as her car is approaching, without looking to see whether another car is approaching on the track on which she has stepped.[3]

The same rule has been applied to passengers standing between tracks at stations. A passenger at a railroad station, who, in anticipation of the approach of his train, stands on the planking between two tracks, and is injured in consequence of a coal train backing up on one track, while his train is arriving on the other track, is guilty of contributory negligence as matter of law; there being a safe place beyond the tracks, provided by the company, at which he could have remained until the actual arrival of his train.[4] But in New York it has been held that one intending to board a train is not guilty of contributory negligence, as matter of law, in standing on a sidewalk between two parallel tracks in front of the depot, so as to bar a recovery for injuries sustained in being caught on the walk between two trains on the parallel tracks.[5]

[3] Bailey v. Railway Co., 110 Cal. 320, 42 Pac. 914.

[4] McGeehan v. Railroad Co., 149 Pa. St. 188, 24 Atl. 205. Ordinary prudence requires that one standing on a station platform between two tracks, sufficiently wide to give him abundant room for safety, should give reasonable attention to his surroundings. He cannot recover where he becomes so abstracted in thought as to be oblivious to his surroundings, and where he stands so near the edge as to be struck by an approaching engine. Chicago, B. & Q. R. Co. v. Mahara, 47 Ill. App. 208.

[5] O'Toole v. Railroad Co., 58 Hun, 609, 12 N. Y. Supp. 347, affirmed 128 N. Y. 597, 28 N. E. 251.

§ 136. CROSSING RAILROAD TRACK AT STATION.

The rule requiring a person to stop, look, and listen before crossing a railroad track does not apply to the case of a passenger who is compelled to cross an intervening track at a station in order to reach his train. In such a case, the rule, as established by the weight of authority, is that the passenger is justified in assuming that the company has, in the exercise of due care, so regulated its trains that the road will be free from interruption or obstruction when passenger trains stop at a station or depot to receive and deliver passengers. Upon any other principle, the lives of passengers might be most dangerously exposed, in the hurry, noise, and confusion that generally attend the arrival and departure of passenger trains at stations. Hence the rule which quite generally prevails is that the court cannot declare a passenger guilty of negligence, as matter of law, in failing to look and listen for an approaching train before crossing an intervening track on his way between the station and the train; but that the question is one of fact for the jury.[1] Thus, where the

§ 136. [1] Baltimore & O. R. Co. v. State, 60 Md. 449; Atchison, T. & S. F. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108; Denver & R. G. R. Co. v. Hodgson, 18 Colo. 117, 31 Pac. 954; Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201; Malmsten v. Railroad Co., 49 Mich. 94, 13 N. W. 373; Chicago & E. I. R. Co. v. Chancellor, 60 Ill. App. 525; Terry v. Jewett, 78 N. Y. 338, affirming 17 Hun, 395; Brassell v. Railroad Co., 84 N. Y. 241; Parsons v. Railroad Co., 113 N. Y. 355, 21 N. E. 145; S. C. 37 Hun, 128; Hirsch v. Railroad Co., 53 Hun, 633, 6 N. Y. Supp. 162; Pineo v. Railroad Co., 34 Hun, 80; Van Ostran v. Railroad Co., 35 Hun, 590; Gonzales v. Railroad Co., 39 How. Prac. (N. Y.) 407, reversing 1 Sweeney (N. Y.) 506; Green v.

name of a station is called in the nighttime, and the train is brought to a standstill on a side track near the station, a passenger, having no notice of danger, is justified in accepting the company's implied invitation to alight; and his failure to look and listen before attempting to cross the main track on his way to the station is not contributory negligence, as matter of law, which will bar a recovery for injuries sustained by be-

Railway Co., 11 Hun, 333; Armstrong v. Railroad Co., 66 Barb. (N. Y.) 437, affirmed in 64 N. Y. 635; Jewett v. Klein, 27 N. J. Eq. 550; Boss v. Railroad Co., 15 R. I. 149, 1 Atl. 9; Robostelli v. Railroad Co., 33 Fed. 796. One who, while crossing a railroad track from a depot to go to his train on the next track, is struck by a train running 25 miles an hour, which he did not see, and which, owing to a curve in the track, could have been seen only when within a short distance of the depot, is not necessarily guilty of contributory negligence. Chicago, St. P. & K. C. R. Co. v. Ryan (Ill.) 46 N. E. 208, reversing 62 Ill. App. 264. The rule requiring a person, before crossing a railroad at a highway, to stop, and look and listen for approaching trains, does not apply to persons who are crossing the track on a walk at a station, for the purpose of boarding a train. Warfield v. Railroad Co., 8 App. Div. 479, 40 N. Y. Supp. 783. A similar rule prevails in England. A person accompanying a passenger to a station was killed at the station by a collision with a train, while walking across the track. The accident happened in the nighttime, and, standing on the platform from which he started, deceased's view of the approaching train was cut off by another train on an intervening track, but after he had passed this intervening track there was a distance of six feet to the other track, and he could have seen the approaching train at any point of this six feet had he looked. The approaching train, however, failed to sound any whistle, as it was required to do by defendant's rules. Held, that it was for the jury to determine whether or not plaintiff's failure to look for approaching trains while on the six-foot way, or the negligence of the company in failing to sound the whistle, was the proximate cause of the accident, and that a verdict could not be directed for defendant on the ground of contributory negligence. Dublin, W. & W. Ry. Co. v. Slattery, 3 App. Cas. 1155.

ing struck by an approaching train, but the question is one of fact for the jury.[2] So where a passenger is carried beyond the station, and into the switching yard, and is struck by an engine while attempting to cross a track on her way out of the yard, it is for the jury to determine whether she, with such knowledge as she possessed of the peril of the place, and with the presumption she was entitled to indulge as to the degree of care which defendant's employés would exercise for her protection, was herself guilty of negligence which proximately contributed to her injury.[3] It has been

[2] St. Louis S. W. Ry. Co. v. Johnson, 59 Ark. 122, 26 S. W. 593. A passenger whose hat has blown off is not guilty of negligence, as matter of law, in stepping on a railroad track to pick it up, so as to bar a recovery for injuries sustained by being struck by a locomotive. Bernhard v. Railroad Co., 1 Abb. Dec. (N. Y.) 131, affirming 32 Barb. (N. Y.) 165. It is a question of fact for the jury whether a passenger on his way to take a train, who steps back on a track to avoid an approaching train on another, is guilty of negligence in failing to observe a detached freight car moving slowly along the track on which he has stepped. Hempenstall v. Railroad Co., 82 Hun, 285, 31 N. Y. Supp. 479. The same rule applies to a mail and express man, while on his way to the train to get the mail. Tubbs v. Railroad Co. (Mich.) 64 N. W. 1061.

[3] Franklin v. Motor Road Co., 85 Cal. 63, 24 Pac. 723. Where a railroad company constructs a platform for the use of passengers between two parallel tracks, a passenger who is walking along it on his way to the train, and whose progress is impeded by a crowd of other passengers, is not guilty of negligence, as matter of law, in stepping on one of the tracks, to pass around the crowd, without looking for a rapidly approaching train, which strikes him as he steps on the track. Union Pac. Ry. Co. v. Sue, 25 Neb. 772, 41 N. W. 801. A passenger, leaving the station, passed along the platform, until he reached a stairway. On arriving at the bottom of the stairs, his further progress was obstructed by a pile of shells placed there by the company, and he was compelled to step aside, on the ends of

held by the supreme court of the United States that a passenger who is compelled to cross an intervening track in alighting from a train, in order to reach the station, is not guilty of contributory negligence, as matter of law, in failing to be on the lookout for an approaching train, where the ties have been covered up with earth, and it does not appear that he knew that he was on a railroad track.[4] The supreme judicial court of Massachusetts has held that where it is necessary for a passenger to cross an intervening track in going from the station to his train, and he is asked by the station agent to cross over, it cannot be said, as matter of law, that he is guilty of contributory negligence in walking across the track, so as to preclude recovery for injuries sustained by being struck by an engine; but it is a question of fact, to be determined by the jury in view of all the circumstances.[5] So where a passenger alights at the station, on a narrow platform, between two tracks, and is struck by an engine while attempting to cross one of them, the question whether she exercised due care is for the jury, on her testimony that she looked up and down the track before stepping on it, and that she was unable to see any indication of an

the cross ties, on a side track. After taking a few steps, he was struck by an engine and injured. Steam was escaping from the engine on the main track, so that he did not hear the approaching train, and he did not know that it was due. Held, that his failure to look for the approaching train, when stepping on the side track, was not negligence, as matter of law. Sanchez v. Railway Co., 3 Tex. Civ. App. 89, 22 S. W. 242.

[4] Richmond & D. R. Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748.

[5] Warren v. Railroad Co., 8 Allen (Mass.) 227.

approaching train.[6] And a passenger going from the station house, in the direct and usual course, to enter cars which are waiting to receive passengers, who is obliged, by the location of the tracks, to pass over an unoccupied track, has a right to rely, to some extent, upon proper and usual signals of warning being given by trains or cars passing the unoccupied track at such a place, and under such circumstances.[7] In Pennsylvania it has been held that, where the only way by which a passenger can reach his train is across an intervening track at a station, no presumption of negligence arises against him because he took that way; nor is it necessarily negligence for him to start across before the train which he intends to take has come to a full stop.[8]

But in neither Massachusetts nor Pennsylvania is

[6] Gaynor v. Railroad Co., 100 Mass. 208.

[7] Chaffee v. Railroad Corp., 104 Mass. 108. "It cannot be maintained, as matter of law, that the plaintiff was negligent in not looking up and down the track at the moment when, in a dark night, he stepped from the platform upon it. He had assured himself, shortly before, by looking each way, that there was no car approaching which would make the crossing hazardous. His attention, with due care to his own safety, may have been properly turned for the instant, to see if there was any obstruction before him on the track, or excavation in his way, or danger of collision with other passengers passing to or from the cars."

[8] Kohler v. Railroad Co., 135 Pa. St. 346, 19 Atl. 1049. In an action for the death of a passenger, killed while crossing a track on his way from the station grounds by a frequented path, generally used by passengers, the evidence was conflicting as to the exact position of the engine when she started to cross, and as to whether it was still on the track when she started. Held, that the question of her contributory negligence was for the jury. Delaware, L. & W. R. Co. v. Jones, 128 Pa. St. 308, 18 Atl. 330.

the rule as broad as that which obtains in most of the states. In Massachusetts it is held that a passenger alighting from a train at a station has no right to assume that trains will not cross each other at a station, and to shut his eyes and walk ahead on that assumption; and he cannot recover for injuries sustained by being struck by an engine, while walking across a track at the station, where it appears that he must have seen the engine had he looked before going on the track.[9] In Pennsylvania it is held that a passenger who, under the mistaken belief that his own train is about to start, runs across an intervening track in front of an approaching train in plain view, without stopping to look and listen, is guilty of contributory negligence as matter of law.[10] A similar ruling has been made in Canada.[11]

[9] Connolly v. Railroad Co., 158 Mass. 8, 32 N. E. 937. A passenger at a railroad station is guilty of negligence in attempting to cross a track, in broad daylight, in front of an approaching engine, at a point not acquiesced in by the railroad as a crossing place, and without any invitation on the part of its employés. Young v. Railroad Co., 156 Mass. 178, 30 N. E. 560. A person at a railway station, intending to take a train, was struck by a locomotive, while crossing a track at a place not designed or adapted for a crossing, though used by persons as such for nearly 20 years. The accident happened in broad daylight, and the track was straight for a quarter of a mile, with nothing to obstruct plaintiff's view. Held, that plaintiff was guilty of contributory negligence in failing to look, though a train had just passed on that track, and though she knew of one of defendant's rules which prohibited trains from passing each other at stations, or from following each other within five minutes. Wheelwright v. Railroad Co., 135 Mass. 225.

[10] Irey v. Railroad Co., 132 Pa. St. 563, 19 Atl. 341; Foreman v. Railroad, 159 Pa. St. 541, 28 Atl. 358, affirming 11 Pa. Co. Ct. 475.

[11] See note 11 on following page.

In all cases, however, the implied invitation and assurance that a passenger compelled to cross an intervening track to reach his train may safely do so continues only so long as the train is stopped at the station for the purpose of receiving passengers and allowing them to alight. Where a reasonable time for this purpose has been given, and the train has started on its way, such implied assurances are at an end, and the obligation to look both ways before crossing the track revives. The failure to do so, under such circumstances, is contributory negligence as matter of law.[12] So the invitation to cross the tracks at a station extends only to persons who have a desire to get on or off the train, and does not extend to people whose only object in crossing the track is to do that with which the railroad company has no concern.[13] So a passenger, who undertakes to cross a track without necessity, when the company has provided another and a safe way, is guilty of contributory negligence, as matter of law, in failing to observe a train in plain

A passenger who gets off on the wrong side of the train, and is killed while crossing the track, by a locomotive which he could not have failed to see had he used his eyes, is guilty of contributory negligence. Morgan v. Railroad Co. (Pa. Sup.) 16 Atl. 353.

[11] A person who goes to a station to meet an arriving passenger is guilty of negligence, as matter of law, in proceeding to cross a side track between the train and the station, without looking for an approaching train, which strikes him as he is about half way across the track. Casey v. Railway Co., 15 Ont. 574.

[12] Chaffee v. Railroad Co., 17 R. I. 658, 24 Atl. 141; Weeks v. Railroad Co., 40 La. Ann. 800, 5 South. 72.

[13] Illinois Cent. R. Co. v. James, 67 Ill. App. 649.

view, which strikes him while he is crossing the track.[14]

§ 137. SAME—AT INTERMEDIATE STATION.

The supreme court of Minnesota has held that a passenger who leaves his train at an intermediate station is guilty of contributory negligence, as matter of law, in failing to look and listen for an approaching train before crossing an intervening track on his way back to his train. To a passenger who thus leaves his train at an intermediate station the company gives no assurance that trains will not pass while he is crossing or recrossing the track, and the passenger assumes the risk. Neither is the conductor's cry of "All aboard" an assurance to a passenger who has left his train that

[14] Bancroft v. Railroad Corp., 97 Mass. 275; Gonzales v. Railroad Co., 38 N. Y. 440; Parsons v. Railroad Co., 85 Hun. 23, 32 N. Y. Supp. 598; Warner v. Railroad Co., 7 App. D. C. 79. A passenger who has alighted from a train, and is waiting for another train on a branch line, is guilty of contributory negligence, as matter of law, in stepping on the track, and cannot recover for injuries sustained in being struck by an engine approaching behind him, the headlight on which could have been seen for 80 yards. Ensley Ry. Co. v. Chewning, 93 Ala. 24, 9 South. 458. One employed to carry mails from a railroad station to the trains stopped on a side track for five or ten minutes, with the mail bag on his shoulder, to converse with some friends. He was killed by a freight car running along the side track. Held, that he was guilty of contributory negligence, as matter of law. Dell v. Glass Co., 169 Pa. St. 549, 32 Atl. 601. The burden of proving freedom from contributory negligence is not sustained by evidence that a person at a station was run over by a train visible for 900 feet, where it further appears that the company had provided bridges and stairways to enable persons to cross the tracks, and had forbidden persons from going on the tracks. Riester v. Railroad Co. (Sup.) 44 N. Y. Supp. 739.

he may cross the main track in safety, without looking for approaching trains.[1] But in New York it has been held that where an excursion train stops at a junction point, and one of the excursionists leaves the car to get a drink of water, the question whether, on his return, he is guilty of contributory negligence in running across an intervening track when he hears the signal to start, without looking for an approaching train, is for the jury.[2]

§ 138. SAME—STEPPING FROM CAR TO TRACK.

A passenger who steps from a train in the nighttime, after the name of his station has been called, and the train has come to a stop, is not, as matter of law, guilty of contributory negligence in failing to look for an approaching train on a parallel track, which strikes him almost immediately after he leaves his train.[1] So a passenger getting off a slowly moving train, with the assistance of the conductor, is not guilty of negligence in failing to be on the lookout for a train on a parallel track, which strikes him as soon as he touches the ground.[2]

§ 137. [1] De Kay v. Railway Co., 41 Minn. 178, 43 N. W. 182.

[2] Wandell v. Corbin, 38 Hun, 391, 49 Hun, 608, 1 N. Y. Supp. 795.

§ 138. [1] Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2; Keller v. Railroad Co., 2 Abb. Dec. (N. Y.) 480, affirming 17 How. Prac. (N. Y.) 102; Pennsylvania R. Co. v. White, 88 Pa. St. 327. In this last case it was said that the rule to stop, look, and listen is not always applicable to passengers leaving a train and crossing the track to reach the depot at the point of destination. They may rely, to some extent, on the presumption that the company will perform its duty, and furnish them a safe means of egress.

[2] McDonald v. Railroad Co., 127 Mo. 38, 29 S. W. 848.

§ 139. SAME—STREET CARS.

In most states the rule is that a passenger who alights from a street car in a place of safety is guilty of contributory negligence, as matter of law, in walking around the rear end of the car onto a parallel track, without looking, right in front of another car, which strikes him the instant he sets foot on the track.[1] And a passenger on a street railway, who, while the car is moving, jumps from it on the side next to the parallel track, and who is struck by a car running in the opposite direction as soon as he lands on the ground, is guilty of contributory negligence as matter of law.[2]

In Nebraska, however, it has been held that a passenger who alights from a street car on the side next to a parallel track, from car steps not barricaded to prevent it, is justified in believing that due care will be exercised by the company in regard to approach-

§ 139. [1] Buzby v. Traction Co., 126 Pa. St. 559, 17 Atl. 895; Smith v. Railway Co. (Or.) 46 Pac. 136; Toledo Consol. St. Ry. Co. v. Lutterbeck, 11 Ohio Cir. Ct. 279. A passenger who alights from a street car, and proceeds to cross a parallel track, is guilty of contributory negligence in failing to observe another car on the parallel track, in plain view, while he was between the two tracks. Doyle v. Railway, 5 App. Div. 601, 39 N. Y. Supp. 440.

[2] Weber v. Railway Co., 100 Mo. 194, 12 S. W. 804, and 13 S. W. 587; MacLeod v. Graven, 19 C. C. A. 616, 73 Fed. 627. A 15 year old boy, stealing a ride on a street car, who jumps from the platform of the car, in obedience to the driver's orders and a threatening gesture by the latter, and is run over by another car on a parallel track, is chargeable with contributory negligence, where that car was in plain view for some time before the accident. Hogan v. Railroad Co., 124 N. Y. 647, 26 N. E. 950, reversing 58 N. Y. Super. Ct. 322, 11 N. Y. Supp. 588.

ing trains on that track, and he is not guilty of negligence, as matter of law, in failing to look for an approaching train before stepping thereon.[3] So, where a cable railroad has a rule in force that at a junction east-bound trains shall clear the junction before west-bound trains shall approach on a parallel track, a passenger who leaves an east-bound train is not chargeable with contributory negligence, as matter of law, in failing to stop and look and listen before crossing the parallel track. He has a right to rely on the rule that no west-bound train shall approach the junction until it is cleared by the east-bound train.[4] And the question whether a passenger, on alighting from a street car at night, in a violent hailstorm, is guilty of contributory negligence in crossing a parallel track, with umbrella raised, is for the jury, where he testifies that he was a stranger in the city, was ignorant of the existence of the parallel track, and did not see it because covered with water.[5]

[3] Omaha St. Ry. Co. v. Loehneisen, 40 Neb. 37, 58 N. W. 535.

[4] Burbridge v. Railway Co., 36 Mo. App. 669.

[5] Boyer v. Railway Co., 54 Minn. 127, 55 N. W. 825. A passenger who gets off a street car, and stops to look for another car on a parallel track before trying to cross it, is not negligent, as matter of law, and may recover for injuries sustained in being struck by a car on the parallel track, which he had not seen, owing to the fact that his view was obstructed by the car from which he had alighted. Snell v. Railway Co., 9 Ohio Cir. Ct. 348. To avoid a truck on a crowded street, a boy jumped on the rear platform of a street car, which blocked the crossing. The conductor kicked at him, and, to avoid the kick, the boy jumped from the platform, landing on the parallel track, without looking for approaching cars, and was struck by a car moving at an unlawful rate of speed, and injured. Held that, though technically a trespasser, the question whether he was

§ 140. WALKING ALONG OR NEAR TRACK.

A passenger waiting for a train at a station is guilty of contributory negligence, as matter of law, in walking along the track, or in dangerous proximity to it, without looking or listening for approaching trains, and cannot recover for injuries sustained in being struck by an approaching engine.[1] So, a passenger

guilty of contributory negligence in leaping without looking was one of fact for the jury; that defendant could not escape the consequences of its own negligence by pointing to an act of the boy contributing to the accident, if his conduct was induced by defendant, nor could it have the benefit of the boy's misjudgment or want of judgment, if the act of its agent threw him off his balance. McCann v. Railroad Co., 117 N. Y. 505, 23 N. E. 164, reversing 56 N. Y. Super. Ct. 282, 3 N. Y. Supp. 418.

§ 140. [1] Holmes v. Railway Co., 97 Cal. 161, 31 Pac. 834; State v. Grand Trunk Railway, 65 N. H. 663, 23 Atl. 525; French v. Railway Co., 89 Mich. 537, 50 N. W. 914. A person at a station is guilty of contributory negligence, as matter of law, in standing on a track, without looking or listening for a train which was visible a mile away had he looked. Edgerton v. Railroad Co., 6 App. D. C. 516. Circumstances may, however, excuse the passenger. A passenger unacquainted with the station grounds walked, on a dark night, towards the station, between the main track and a siding, which was the method in common use there. A train came along on the main track, and he tried to get out of its way, but was stopped by a coal car on the siding, which he had been unable to see on account of the darkness. Held, that the question of his contributory negligence was for the jury. Shutt v. Railroad Co., 149 Pa. St. 266, 24 Atl. 305. At the junction of a cable and an electric street railway, the accumulated snow had been banked by the company to the height of four or five feet along the tracks. Held, that a passenger who had left the car for the purpose of completing her journey on the electric car, about a block away, was not guilty of contributory negligence in walking along the track between the snow walls, even without looking or listening; and that she was not thereby debarred from recovering for

alighting from a train at night, who finds his progress to the station barred by a freight train on an intervening track, and who starts to go around the train, and falls into a cattle guard, with the location of which he is familiar, is guilty of contributory negligence, as matter of law, whether the night is dark or not.[2] A train approaching a flag station at night was signaled by a bystander, but it did not come to a stop until it had passed the station platform about 200 feet. It was held that an intending passenger was guilty of contributory negligence, as matter of law, in running along the track to reach the train, and that there could be no recovery for his death caused by the train's backing towards the station; he being unable to see its movement in the dark.[3] But a passenger, who has

injuries sustained by reason of the unexpected backing of the electric car, crushing her between it and the snow bank. Cameron v. Trunk Line, 10 Wash. 507, 39 Pac. 128.

[2] St. Louis, I. M. & S. Ry. Co. v. Cox, 60 Ark. 106, 29 S. W. 38.

[3] St. Louis & S. F. R. Co. v. Whittle, 20 C. C. A. 196, 74 Fed. 296. Judge Caldwell dissented very vigorously, and it would seem justly, in this case. He said: "In the case at bar, 16 men—12 jurymen and 4 judges—have been called upon to draw a conclusion from the same evidence. Of this number, the 12 men appointed by the constitution to be the exclusive triors of the question have found Whittle was not guilty of contributory negligence, and the learned and experienced trial judge and one member of this court have found that the testimony abundantly supports the verdict of the jury, and two judges of this court are of a different opinion. The rule of the supreme court is that, unless 'all reasonable men' would draw the conclusion that the party was guilty of contributory negligence, the verdict of the jury must stand; but the majority of the court have substituted for the rule of the supreme court a rule which, if put into words, would read that if, out of 16 reasonable men, 2 can be found who draw conclusions different from the 14, the verdict of the 2 shall pre-

been carried beyond her destination, and discharged some distance from the station, and directed to walk to the station house over the track, is not guilty of con-

vail over that of the 14. But this statement of the new rule falls far short of illustrating the extent of the invasion of the functions of the jury in this case: for I hazard nothing in saying that a fair and impartial jury cannot be found in this circuit of 11 states who would not, upon the evidence in this record, return the same verdict that was returned by the jury that tried this case. * * * It is only in recent times, and since corporations have absorbed the capital and business pursuits of the country, that a tendency has developed, in some courts, to impinge on the functions of the jury and the constitutional rights of suitors. This invasion of the functions of the jury is attempted to be justified upon the ground that juries are prejudiced against corporations, and that it is the duty of the courts to protect them from such prejudice. This is an unfounded assumption. The danger to life and property growing out of the management and operation of railroads has been greatly lessened in recent years, and this improvement is largely due to the verdicts of juries. Corporations formed for pecuniary profit act from pecuniary considerations alone, and it was not until it became obvious that it was cheaper to incur the expense necessary to give greater security to life and property in the operation of their roads than it was to pay the damages awarded by the verdicts of juries for negligently failing to provide reasonable safeguards that railroad companies exercised more care, and adopted better and safer methods, for the operation of their roads. Juries whose intelligence and impartiality are impugned have no opportunity to be heard in their own defense. If they were accorded an opportunity to answer this charge of the judges against them, they would probably content themselves with a reference to the 'mote' and the 'beam,' with an earnest asseveration that the beam was not in their eye." In Mills v. Railroad Co., 5 App. Div. 11, 39 N. Y. Supp. 280, the facts were as follows: Plaintiff, who was familiar with the surroundings, alighted from a train a short distance from the passenger station, at a village where it stopped only for coal and water. Starting for the station, on another track, while under the coal chute, which extended over the track, and left no room to get off at the sides, he was struck by a train coming from

tributory negligence, as matter of law, in attempting to walk over a cattle pit in the track.[4]

§ 141. CRAWLING UNDER OR BETWEEN CARS.

A passenger or other person on his way to or from a railroad station is guilty of negligence, as matter of law, in attempting to crawl through or under cars in a train which obstructs his further progress, where he knows that an engine with steam up is attached to the train, and is liable to start at any moment. It is difficult to conceive of an act more recklessly careless than such an attempt.[1] But where a passenger is directed by the ticket agent to take a train away from the depot, the question whether she is guilty of contributory negligence in passing through an open space between two cars is one of fact for the jury, where she testifies that she looked for approaching cars before going into the open space, and failed to discover slowly moving cars detached from the engine, which struck one of the standing cars, and thus closed up the open space while plaintiff was walking through it.[2]

in front, and which he knew was due at about that time. The train could have been seen some distance ahead, but, just before being struck, smoke from an engine got in his eyes. There was also considerable noise from other engines, and it was impossible to move quickly, owing to the track's being wet from the water tank. Held that, as matter of law, he was guilty of contributory negligence.

[4] New York, C. & St. L. Ry. Co. v. Doane, 115 Ind. 435, 17 N. E. 913.

§ 141. [1] Smith v. Railroad Co., 55 Iowa, 33, 7 N. W. 398; Chicago & N. W. R. Co. v. Coss, 73 Ill. 394; Chicago, B. & Q. R. Co. v. Dewey, 26 Ill. 255; Memphis & C. R. Co. v. Cope'and, 61 Ala. 376.

[2] Allender v. Railroad Co., 37 Iowa, 274.

§ 142. BOARDING CAR AHEAD OF TIME.

It is not contributory negligence, as matter of law, for a passenger to enter a passenger car a few minutes in advance of the time fixed by the rules of the company, of which he is ignorant.[1] Neither is it negligence per se for a passenger to enter a coach at a station, at about the time designated for the departure of the train, and in apparent readiness for passengers, except that the locomotive has not yet been attached, where the passenger is ignorant of the rule of the company forbidding passengers to get on the cars until the train is made up.[2]

§ 143. BOARDING CAR NOT DRAWN UP AT STATION PLATFORM.

A railroad company may make reasonable rules respecting the time, mode, and place of entering the cars, and the passenger must comply with them if they are known to him. He cannot violate them, and pursue another course, and hold the company liable for damages thus occasioned, which could have been avoided by conforming to the rules and regulations of the company, even though the jury may believe that an ordinarily prudent person would or might have adopted the same course. But the mere existence of a platform in front of the depot is not, as matter of law, necessarily notice to the passenger that the train will be drawn up at that place to receive him, and that the

§ 142. [1] Western Md. R. Co. v. Herold, 74 Md. 510, 22 Atl. 323.
[2] Root v. Railway Co., 33 Fed. 858.

company prohibits passengers from entering them elsewhere. If a station room is full, or if it is intolerably offensive by reason of tobacco smoke, so that a passenger has good reason for not remaining there, it will justify his endeavor to enter the cars at as early a period as possible, though they are not drawn up at the station platform, but are standing some distance away; and if, in so doing, he receives an injury from the unsafe or dangerous condition of the station platform or steps, in a place where passengers would naturally go, the company is liable therefor.[1] So where the sleeping coach of a long train is outside of the depot yard, it is not contributory negligence for a passenger to approach the coach by a sidewalk outside the depot yards, leading to it in a direct route, and constructed by the railroad company, instead of entering one of the front coaches at the depot platform, and walking through the train to the sleeping car; and the

§ 143. [1] McDonald v. Railroad Co., 26 Iowa, 124. Although a railroad company may have provided a platform where the trains regularly stop for the ingress and egress of passengers, it is not per se contributory negligence for a passenger to attempt to enter a train at a place other than the platform, in the absence of notice that passengers will be received only at such platform, and are prohibited from attempting to enter the car at any other place. And especially is this true where the passenger is directed to take the car elsewhere than at the platform by a person wearing the company's uniform, and justifiably supposed to be an official. Baltimore & O. R. Co. v. Kane, 69 Md. 11, 13 Atl. 387; s. c. 17 Atl. 1032. It cannot be said, as matter of law, that getting on a passenger train at a place other than the station platform is negligence on the part of the passenger contributing to an injury received, while entering the car, because of the violent and negligent starting of the train. Stoner v. Pennsylvania Co., 98 Ind. 384.

company is liable for an injury to the passenger caused by a defect in the sidewalk.[2] A passenger is not guilty of contributory negligence in entering a caboose of a mixed freight and passenger train at a point 50 feet from the platform, without notifying the conductor, where the rules of the company require persons taking passage on such trains to get on from the roadbed, or wherever the convenience of those in charge of the train demands.[3]

In England, however, it has been held that where a railway company provides a proper crossing over its tracks for the use of passengers desiring to take its trains, a passenger who has knowledge of the crossing so provided cannot recover for injuries sustained in attempting to cross at another place.[4] So, one who, in the nighttime, goes into a railroad yard, at a place where the company is not accustomed to receive passengers, and who, without the knowledge of those in charge of a freight train standing there, attempts to enter the caboose attached to the train, is guilty of

[2] Moses v. Railroad Co., 39 La. Ann. 649, 2 South. 567.

[3] Louisville & N. R. Co. v. Long, 94 Ky. 410, 22 S. W. 747. A passenger, standing on a passenger platform at a station, who sees a train with an engine attached standing on the track some distance away, but headed towards him, has a right to suppose that it will be brought up to the station to take on passengers; and his waiting in the passenger station for the train to come up and stop is not negligence contributing to an injury received in the dark by falling over an obstruction while hastily going to the train, after being notified by the ticket agent that it would not come to the passenger station. Nor is his running for the train, instead of walking, contributory negligence, as matter of law. MacLennan v. Railroad Co., 52 N. Y. Super. Ct. 22.

[4] Willy v. Railway Co. [1876] 25 Law T. (N. S.) 244.

contributory negligence, and cannot recover for injuries sustained in the attempt.[5] Where an open passenger car is standing on the track, not coupled to the rest of the train, and the conductor warns a passenger not to enter the car until it has been coupled, and moved to a point exactly opposite the depot, it is contributory negligence for the passenger to enter the car before it has been coupled and moved to the point designated by the conductor; and this is true, even if the car, before it was coupled and moved, was standing at the place where passengers usually board the train.[6]

§ 144. BOARDING OR LEAVING TRAIN ON WRONG SIDE, OR BY IMPROPER ENTRANCE OR EXIT.

The courts are united on the proposition that a passenger who arrives at a station before train time, and who deliberately waits for the train on the side of the track away from the depot platform, is guilty of negligence in attempting to enter the train on that side, where the company has provided a safe platform on the other.[1]

[5] Haase v. Navigation Co., 19 Or. 354, 24 Pac. 238.

[6] Tillet v. Railroad Co., 115 N. C. 662, 20 S. E. 480. "While the conductor may, on the one hand, excuse a debarking passenger from contributory negligence, by advising him to get off before it has ceased to move, he may, on the other hand, make the passenger's conduct culpable, where he gives him an unheeded warning not to enter such open car till it has been removed to another point." Id.

§ 144. [1] Michigan Cent. R. Co. v. Coleman, 28 Mich. 440. A passenger who goes on the side of a train away from the station platform, and presumably not the place arranged to receive passengers, and, finding no place of access, attempts to climb upon the train from between the cars, with the barrier of a railing before him to be

But on the question of the passenger's contributory negligence in alighting from the wrong side of the train, there is some conflict in the authorities. The weight of authority and of reason is that the existence of a safe landing place on one side of the track does not render a passenger guilty of contributory negligence, as matter of law, in getting off on the other side, unless the safe landing place is made so conspicuous as to be easily seen by the passenger, or unless he knows of its existence.[2] A passenger, not familiar with a station, is not guilty of contributory negligence, as matter of law, in alighting from a train on the side away from the station platform.[3] So where a train is brought to a standstill on an elevated trestle, and the railroad company has provided a safe landing place on the south side of the cars, but no guards or barriers on the north side, to prevent passengers leaving there, the question whether a passenger, who is ignorant of the

sealed when he reaches the level of the car floor, and who, in so doing, places his foot upon the bumper, where it is crushed by a motion of the train, is guilty of contributory negligence, as matter of law. Wardlaw v. Railway Co. (Cal.) 42 Pac. 1075.

[2] Poole v. Railroad Co., 100 Mich. 379, 59 N. W. 390. As to negligence of railroad company in this respect, see ante, § 62.

[3] Dickens v. Railroad Co., 1 Abb. Dec. 506, *40 N. Y. 23. The question whether a passenger is guilty of contributory negligence in alighting on the side of the car away from the depot is one of fact for the jury, where it is shown that it is not unusual for passengers to alight on that side, which is the one nearest the town. Plopper v. Railroad Co., 13 Hun, 625. Where the rear car of a train is stopped on a street crossing, and no warning is given as to which side passengers shall leave the car, a passenger is not chargeable with negligence, as matter of law, in leaving the car on one side, rather than on the other. Van Ostran v. Railroad Co., 35 Hun, 590.

surroundings, but who has observed passengers getting off on the north side at another station, is guilty of contributory negligence in stepping from the car on the north side, is one of fact for the jury, and a verdict in plaintiff's favor cannot be disturbed.[4] The supreme court of the United States has even held that a passenger who leaves a car on the side prohibited by the printed regulations of the company, posted in the car, is not thereby debarred from recovering for injuries, where such regulation was habitually disregarded by passengers, with the acquiescence of the conductor, and the servants of the road about the station.[5] But a passenger who leaves a train on the side away from the depot, when on the depot side there is a large well-lighted platform, which fact he could have known by the exercise of ordinary diligence, assumes the risk of injury in alighting on the wrong side.[6] It has even been held that where a railroad company has provided a safe platform for its passengers on one side of its

[4] Kentucky & I. Bridge Co. v. McKinney, 9 Ind. App. 213, 36 N. E. 448. Though a railroad company has provided a platform on one side of its track, on which passengers may alight, an attempt of a passenger to get off on the other side is not negligence per se; but the question is for the jury, to be determined on all the evidence in the case. McQuilken v. Railroad Co., 64 Cal. 463, 2 Pac. 46.

[5] Chicago, M. & St. P. Ry. Co. v. Lowell, 151 U. S. 209, 14 Sup. Ct. 281. "A railway company does not discharge its entire obligation to the public by a notice of a certain requirement, permitting that requirement to be habitually disregarded, and then proceeding on the theory that every one is bound to comply with it. If, in such a case, an accident occur, the defendant should not be permitted to rely exclusively on a breach of its regulation." Id.

[6] Louisville & N. R. Co. v. Ricketts, 96 Ky. 44, 27 S. W. 860; Id., 93 Ky. 116, 19 S. W. 182.

track, a passenger who, without necessity, gets off on the wrong side, is guilty of contributory negligence, though the company has adopted no means to prevent passengers from getting off on the wrong side, and though passengers habitually get off on the wrong side.[7]

In a few cases the question has been raised whether a passenger is guilty of contributory negligence in leaving the car at one end, rather than at the other. In Michigan it has been held that it is not negligence, as matter of law, for a passenger to leave a car at its rear end, in the absence of any rule or general custom making the forward end the only proper place.[8] But in Illinois it has been held that where a railroad train stops on a dark night at a street crossing, and the conductor is at hand on the front of the car, assisting passengers to alight, a passenger who, with knowledge of this fact, undertakes to alight at the rear of the car, where it is so dark as to render it impossible for her to discern where she is about to land, is not in the exercise of ordinary care, as matter of law, and she cannot recover for injuries sustained in falling into a culvert near the track.[9]

A passenger cannot be convicted of negligence in getting on one car, rather than another, provided both are intended for the use of passengers. Thus, a passenger about to board a train of cable cars, consisting of two trailers and the grip car, is not chargeable with

[7] Pennsylvania R. Co. v. Zebe, 37 Pa. St. 420, 33 Pa. St. 318.

[8] Cartwright v. Railway Co., 52 Mich. 606, 18 N. W. 380.

[9] Chicago, R. I. & P. R. Co. v. Dingman, 1 Ill. App. 162.

contributory negligence in passing by the trailers to get on the grip car in front.[10] But a person who mounts the front platform of the express car in a train about to start, with knowledge that this car is in the exclusive control of the express company, and that it is unlawful for passengers to enter it, takes upon himself the hazards of his voluntary act, and cannot recover for injuries sustained in falling from the platform, in consequence of the express agent's refusal to unlock the car door, so as to enable him to reach the passenger coaches in the rear.[11]

As to the duty of a passenger in leaving a combination baggage and passenger coach by the rear door, rather than by the side door, the authorities are in conflict. In Pennsylvania it has been held that a passenger is guilty of negligence in leaving such a car through the side door, at which baggage is received and discharged, where at each end of the car there are the usual conveniences for ingress and egress, consisting of a door, platform, steps, and railing.[12] In Texas, on the contrary, it has been held that the mere fact that a railroad company has furnished such a coach with a platform and steps at the rear end does not, as matter of law, render a passenger guilty of contributory

[10] Cohen v. Railroad Co., 9 C. C. A. 223, 60 Fed. 698; Hawkins v. Railway Co., 3 Wash. St. 592, 28 Pac. 1021.

[11] Ohio & M. R. Co. v. Allender, 47 Ill. App. 484. But it has been held not contributory negligence, as matter of law, for one to board the platform of a baggage car while the train is in motion, and, finding the car door locked, to remain there; and there may be a recovery for his death in a collision with another train. Illinois Cent. R. Co. v. O'Keefe, 63 Ill. App. 102.

[12] Deery v. Railroad Co., 163 Pa. St. 403, 30 Atl. 162.

negligence in attempting to leave the car, in the nighttime, by the side door of the baggage compartment, which is almost exclusively used by passengers for that purpose.[13] So it is not negligence, as matter of law, for a drover accompanying stock to attempt to enter a stationary car containing his horses by the side door, instead of a door at the end, which is used only in cases of emergency, or when drovers have occasion to enter the car while the train is in motion.[14]

§ 145. SAME—FRONT PLATFORM OF STREET CAR.

An attempt to board a stationary street car by the front platform is not negligence per se.[1] Neither is a passenger guilty of negligence, as matter of law, in attempting to alight from the front platform of a standing car, rather than the rear.[2] In an early Maryland case, however, it was held negligence, as matter of law,

13 Missouri Pac. Ry. Co. v. Long, 81 Tex. 253, 16 S. W. 1016.

14 Pitcher v. Railway Co., 61 Hun, 623, 16 N. Y. Supp. 62; Id., 55 Hun, 604, 8 N. Y. Supp. 389, affirmed in 137 N. Y. 568, 33 N. E. 339.

§ 145. 1 Pfeffer v. Railway Co., 4 Misc. Rep. 465, 24 N. Y. Supp. 490, affirmed in 144 N. Y. 636, 39 N. E. 494. It is not negligence per se to attempt to mount the front platform of a standing car, on invitation of the driver. De Rozas v. Railroad Co., 13 App. Div. 296, 43 N. Y. Supp. 27.

2 Mulhado v. Railroad Co., 30 N. Y. 370. A 13 year old boy, who attempted to board a street car on the front platform, was told by the driver to get on in the rear. At the rear platform, he was told by some one to get on in front. In passing to the front, he slipped in the snow, which had been left by the company sloping towards the track, and which had become smooth and hard. Held, that the question of contributory negligence was for the jury, and not the court. Mowrey v. Railway, 51 N. Y. 666, reversing 66 Barb. (N. Y.) 43.

for a person to get off the front platform of a street car in known violation of the rules of the company.[3]

In Missouri a statute [4] relating to street railroads in the city of St. Louis declares that such railroads shall not be liable for injuries occasioned by getting on or off the cars at the front platform. Under this statute, the company is relieved from liability in all cases except where it appears that the injuries were sustained by reason of some negligence on the part of the company wholly independent of the fact that the passenger attempted to get on or off the front platform.[5]

§ 146. ALIGHTING AT DANGEROUS PLACE—INVITATION.

Where the name of a station has been announced, and the train has been brought to a standstill, a passenger is not guilty of contributory negligence in assuming that the station has been reached, and in alighting in the dark, and he may recover for injuries sustained in falling through a trestle on which the train had been brought to a stop.[1] So, if a conductor

[3] Baltimore City Pass. Ry. Co. v. Wilkinson, 30 Md. 224. A passenger is guilty of negligence, as matter of law, in climbing over the dasher on the front platform of a street car, and cannot recover for injuries sustained by being caught between the car and another car on a parallel track. Fry v. Railway Co., 17 Phila. 61.

[4] Act Mo. Jan. 16, 1860.

[5] McKeon v. Railway Co., 42 Mo. 79. Injuries to a passenger while standing on the front platform, with the intention of getting off, caused by being struck by the brake handle at the middle of the dashboard, are not "occasioned" by getting off the front platform, within the meaning of the statute. Nissen v. Railway Co., 19 Mo. App. 662.

§ 146. [1] Richmond & D. R. Co. v. Smith, 92 Ala. 237, 9 South. 223; McGee v. Railway Co., 92 Mo. 208, 4 S. W. 739; Terre Haute & I. R.

is acquainted with the surroundings of a place where a train is to stop, knows it to be dangerous, and directs a passenger to get off, the question whether the passenger is guilty of contributory negligence in alighting in the nighttime, without taking any precautions, is one of fact for the jury, and their finding in plaintiff's favor will not be disturbed.[2] Where a conductor has promised to transfer a shipper of stock to another train at a station, but, instead, transfers him at a different and dangerous place in the nighttime, the failure of the shipper to notice a water way between the tracks, to which his attention has not been called, is not contributory negligence.[3] Neither is it contributory negligence, as matter of law, for a passenger to attempt to get off a train after it has stopped at a point beyond the station platform.[4] And where an elevated train

Co. v. Buck, 96 Ind. 346, 360; Philadelphia & R. R. Co. v. Edelstein (Pa. Sup.) 16 Atl. 847; Pennsylvania Co. v. Hoagland, 78 Ind. 203. As to negligence of the carrier in this respect, see ante, §§ 58, 68.

[2] Southern Kansas Ry. Co. v. Painter, 53 Kan. 414, 36 Pac. 731. Where a train is stopped on an embankment about six feet high, and passengers are directed to get off by the conductor, a passenger who does so, in order not to miss another train then waiting at the station, is not guilty of contributory negligence, though he testified that he knew the place to be dangerous. Hinshaw v. Railroad Co., 118 N. C. 1047, 24 S. E. 426.

[3] Griffith v. Railway Co., 98 Mo. 168, 11 S. W. 559.

[4] Raub v. Railway Co., 103 Cal. 473, 37 Pac. 374; McDonald v. Railway Co., 88 Iowa, 345, 55 N. W. 102. Where a train runs beyond a passenger's station, at night, without his knowledge, and the ground is so covered with snow that its surface cannot be distinguished, it is not negligence for the passenger to assume, on the carrier's invitation to alight, that his car is at the station platform. Chesapeake & O. Ry. Co. v. Friel (Ky.) 39 S. W. 704. It is not contributory negligence, as matter of law, for a passenger to attempt to leave a train

is stopped in the nighttime on a curve, so that there is necessarily a space of 14 inches between the end of the car steps and the station platform, and the hole is unguarded and unlighted, a passenger, unconscious of danger, is under no obligation, as matter of law, to look before she puts her foot down; but it is a question of fact for the jury to decide, not only whether she should have been more vigilant, but also whether, if she had looked, she could have seen the hole notwithstanding the darkness.[5] But a passenger about to board a train at an elevated railroad station, who knows that there is an open space, from two to six inches wide, between the station platform and the car, is guilty of contributory negligence, if, without looking, she steps into the open space.[6]

It should be borne in mind that only when the announcement of a station is made by the carrier's servants is the passenger entitled to act on the assumption that the train has arrived there when it subsequently stops. He acts at his peril when the announcement is made by a fellow passenger. Contributory negligence is attributable to a passenger, who, without any intimation from the trainmen that it is his stopping place, while the train is halting a moment on a trestle, alights hurriedly in the dark, without looking for a

which has been stopped a few feet from the station platform, where it is customary for passengers to get off at that place. Carroll v. Burleigh (Wash.) 46 Pac. 232.

[5] Boyce v. Railway Co., 118 N. Y. 314, 23 N. E. 304, affirming 54 N. Y. Super. Ct. 286.

[6] Hanrahan v. Railway Co., 53 Hun, 420, 6 N. Y. Supp. 395, affirmed 130 N. Y. 658, 29 N. E. 1033.

place to alight, and sustains injury from falling into a cañon beneath the trestle; and this is true, though other passengers believed that it was a regular station, and some of them were preparing to leave the train, and though plaintiff was told by one of them to get out quick, as the train would stop only a few moments.[7] So, though the name of a station has been announced, a passenger is guilty of contributory negligence in leaving one of the rear cars of a long train in the dark, and while still in motion, and cannot recover for injuries sustained in falling through a trestle.[8]

§ 147. SAME—JUMPING FROM CAR STEPS TO GROUND.

Where a train is drawn up at a station platform in such a manner as to compel a passenger to make a jump from the car steps to the station platform, a female passenger is not guilty of negligence, as matter of law, in attempting the jump, though she sees that the place is dangerous.[1] But where a train is drawn

[7] Nagle v. Railroad Co., 88 Cal. 86, 25 Pac. 1106. A drover on a stock train, riding in the caboose at night, was awakened by a fellow passenger, and informed that the train had reached his destination. Held, that he was negligent, as matter of law, in getting off the train in the dark, without ascertaining whether the train was in fact at the station, and that he could not recover for injuries sustained in falling from a bridge on which the train was standing. Blevins v. Railroad Co., 3 Okl. 512, 41 Pac. 92.

[8] Adams' Adm'r v. Railroad Co., 82 Ky. 603.

§ 147. [1] Delamatyr v. Railroad Co., 24 Wis. 578. It is not contributory negligence for a passenger, incumbered with two small valises, to alight from a stationary train at a point where it is nec-

up at a station so that some of the coaches are at the platform, a female passenger who in broad daylight elects to jump from the car steps to the ground, a distance of three feet, instead of passing through the coach ahead, and alighting safely on the platform, is guilty of negligence, and cannot recover for injuries sustained in so alighting.[2] And a female passenger, who jumps from a stationary car four feet to the ground, after she is warned that it is dangerous, is guilty of contributory negligence, and cannot recover for injuries sustained.[3] So it is evidence of negligence on the part of a female passenger to step from the car steps to a movable bench, intended to assist passengers in alighting, which she sees is slippery, and far away, without requesting assistance from one of defendant's employés, who is carrying a bundle for her, and without asking him to move the bench up closer; and it is error for the court to withdraw these facts from the jury as evidence of contributory negligence.[4]

essary for him to jump to avoid a ditch; the train hands having negligently failed to pull the train up at the station platform. Texas & P. Ry. Co. v. McLane (Tex. Civ. App.) 32 S. W. 776. Where a train is stopped at a station in such a position that the lowest car step is from 2½ feet to 3 feet to the ground, and no stool is furnished to assist passengers to alight, a female passenger is not guilty of contributory negligence, as matter of law, in jumping to the ground. Brodie v. Railway Co. (S. C.) 24 S. E. 180.

2 Eckerd v. Railway Co., 70 Iowa, 353, 30 N. W. 615; Quebec Cent. R. Co. v. Lortie, 22 Can. Sup. Ct. 336.

3 Evansville & C. R. Co. v. Duncan, 28 Ind. 441.

4 McDermott v. Railway Co., 82 Wis. 246, 52 N. W. 85.

§ 148. BOARDING OR ALIGHTING FROM STATIONARY STREET CAR.

It is not negligence per se for a passenger to step aboard a stationary street car, when the platform is unoccupied, without taking hold of the railings with his hand, to guard against the sudden movement of the car, and particularly so when the person in charge of the car has been notified that the passenger is in the act of entering it.[1] Where a car has stopped for the purpose of permitting its passengers to alight, and is standing perfectly still, it is not negligence, as a matter of law, for a person to step off it, without retaining hold of supports.[2] Neither is a passenger guilty of negligence in failing to take precautions against the starting of the car while in the act of alighting, though she did not give the signal to stop, since she has a right to assume that it will not be started until she has gotten off from it entirely.[3] Neither is a passenger chargeable with negligence because he notifies the driver of his desire to get off, instead of the conductor.[4] And there is no rule of law that forces a passenger to rush at once for the steps of the car when it stops, or that forbids him to give precedence to a female passenger,

§ 148. [1] Ganiard v. Railroad Co., 50 Hun, 22, 2 N. Y. Supp. 470, affirmed in 121 N. Y. 661, 24 N. E. 1092.

[2] Martin v. Railroad Co., 3 App. Div. 448, 38 N. Y. Supp. 220.

[3] Fisk v. Railroad Co., 2 Alb. Law J. (N. Y.) 50. Where a public vehicle stops at an ordinary stopping place at the request of a passenger wishing to alight, another passenger, who follows him, is not guilty of contributory negligence in failing to notify the driver of her intention to get off. Geirk v. Connolly, 13 Vict. Law R. 446.

[4] Mulhado v. Railroad Co., 30 N. Y. 370.

or to others more infirm than he.[5] But, on the other hand, a passenger in an open car, after having given the signal to stop, and after it has slackened its speed, is not chargeable with negligence, as matter of law, in putting herself near the edge, so as to be ready to step off as soon as the car stops.[6] A resident of a municipality is bound to take notice of an ordinance which prohibits street cars from stopping on street crossings, and which requires cars to be stopped on the further side of the street in the direction they are moving. This is an everyday incident of street-car travel.[7]

[5] Britton v. Railway Co., 90 Mich. 159, 51 N. W. 276.

[6] Demann v. Railroad Co., 10 Misc. Rep. 191, 30 N. Y. Supp. 926. Carrying a plank on the shoulder, measuring six feet in length, on a principal thoroughfare, is not wrongful, but the person carrying it should be more than ordinarily careful; and he is guilty of negligence in turning towards a car, which he is about to board, with the plank at right angles to it, and projecting beyond his shoulder, over a parallel track, just as a car is approaching on that track, which strikes the plank, and injures him. Byrd v. Railroad Co., 43 La. Ann. 822, 9 South. 565. A passenger carrying a child on her left arm attempted to leave a street car. She tried to get hold of the dasher with her right hand, but could not do so, because another passenger was leaning against it. Her foot slipped on the step by reason of ice thereon, and she fell, and was injured. Held, that the question of her contributory negligence in attempting to alight in the manner she did was for the jury, though she knew of the ice on the car step, and though, had she carried the child on her right arm, she could have held onto the handle with her left hand. Neslie v. Railway Co., 113 Pa. St. 300, 6 Atl. 72. It is not contributory negligence for a passenger about to leave a car to place his hand on the brake wheel; and he is not thereby precluded from recovering for the breaking of his arm, caused by the sudden and rapid revolution of the wheel from

[7] Jackson v. Railway Co., 118 Mo. 199, 24 S. W. 192; North Birmingham St. Ry. Co. v. Calderwood, 89 Ala. 247, 7 South. 360.

§ 149. BOARDING OR ALIGHTING FROM MOVING TRAIN.

It is the general rule of law, established by the clear weight of authority, that the boarding or alighting from a moving train is presumably and generally a negligent act per se; and, in order to rebut this presumption, and justify a recovery for an injury sustained in getting on or off a moving train, it must appear that the passenger was, by the act of the carrier, put to an election of alternative danger, or that something was done or said, or that some direction was given, to the passenger by those in charge of the train, or some situation created, which interfered, to some extent, with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety.[1] In most jurisdictions another exception exists where the circumstances are peculiarly favorable for such an attempt, as where the train is barely in motion, or moving very slowly, opposite a platform, and the passen-

an application of the air brakes. Cleveland, C., C. & St. L. R. Co. v. McHenry, 47 Ill. App. 301.

§ 149. [1] Solomon v. Railway Co., 103 N. Y. 437, 9 N. E. 430; Victor v. Railroad Co., 164 Pa. St. 195, 30 Atl. 381; Johnson v. Railroad, 70 Pa. St. 357; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 18 Atl. 759; McDonald v. Railroad, 87 Me. 466, 32 Atl. 1010; Merritt v. Railroad Co., 162 Mass. 326, 38 N. E. 447; Harvey v. Railroad Co., 116 Mass. 269. The act of getting on or off a moving train is evidence of contributory negligence, and imposes on one who is injured in so doing the burden of proving that the peculiar circumstances of the case justified him in such course. Browne v. Railroad Co., 108 N. C. 34, 12 S. E. 958.

ger is physically active, and his freedom of motion is unimpeded.[2] In all these exceptional cases the question of contributory negligence is one of fact for the jury.

§ 150. SAME—BOARDING MOVING TRAIN.

In New York, a distinction has been made in some of the cases between the act of boarding and the act of alighting from a moving train. It is said that there is generally less excuse in boarding a moving train than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the latter case. He may be compelled to wait for another train, but this is an inconvenience merely, which does not justify exposing himself to hazard.[1] It has accordingly been held by the court of appeals of New York that a passenger who attempts to board a slowly moving train, while in such proximity to a known and prominent obstruction as

2 Butler v. Railroad Co., 59 Minn. 135, 60 N. W. 1090. In Texas, it is not negligence per se for a passenger at a station to get on or off a train after it has started, but the question is for the jury. Houston & T. C. R. Co. v. Stewart (Tex. Civ. App.) 37 S. W. 770. See, also, post, §§ 150–154.

§ 150. 1 Solomon v. Railway Co., 103 N. Y. 437, 9 N. E. 430. In this case a passenger attempted to board an elevated train after the signal to start had been given, and the train was slowly moving. He placed his feet on the car platform, and took hold of the stanchions of the car with both hands, when the conductor closed the gate. He was carried along a few feet, when he was struck by a water pipe near the track. Trains ran every five minutes. Held, that there could be no recovery. Id., affirming Card v. Railway Co., 103 N. Y. 670, 9 N. E. 433.

would render the consequences of a misstep possibly, if not certainly, serious, is guilty of contributory negligence, as matter of law, though the train was moving only one or two miles per hour, and though he was invited to get on by the conductor.[2] "If impatient travelers will persist in making leaps at flying trains, and knowingly taking the chances of frightful hurt, or death itself, in one of its most horrible forms,—that of being ground into quivering pieces under the wheels of a rushing train,—and such disaster befalls, they must understand that the consequences of their madness must be visited on their own heads." [3]

[2] Hunter v. Railroad Co., 126 N. Y. 18, 26 N. E. 958; Id., 112 N. Y. 37, 19 N. E. 820. See, also, Myers v. Railroad Co., 88 Hun, 619, 34 N. Y. Supp. 807; Id., 82 Hun, 36, 31 N. Y. Supp. 153; Fahr v. Railway Co., 9 Misc. Rep. 57, 29 N. Y. Supp. 1; Phillips v. Railroad Co., 49 N. Y. 177, reversing 57 Barb. 644.

[3] McMurtry v. Railroad Co., 67 Miss. 601, 7 South. 401. In this case it was held that an old man, 65 years of age, benumbed with cold, and incumbered by a valise in his right hand, was guilty of contributory negligence, as matter of law, in attempting to board a train on a dark night, in the midst of rapidly falling snow, as it was moving out of a flag station, where there were no accommodations for passengers, and where it had either not stopped at all, or failed to stop long enough to permit him to get on. A passenger who attempts to board a moving train, which has stopped a sufficient length of time to enable all to get on board, and who is struck by an obstruction near the track, is guilty of contributory negligence, as matter of law. McLaren v. Railway Co., 100 Ala. 506, 14 South. 405; Chicago & N. W. Ry. Co. v. Scates, 90 Ill. 586; Harper v. Railway Co., 32 N. J. Law, 88. A passenger who, in an attempt to board a moving train, catches his foot in a hole in the station platform, and falls under the car, and is killed, is guilty of contributory negligence, as matter of law, and there can be no recovery for his death. Bacon v. Railroad Co., 143 Pa. St. 14, 21 Atl. 1002. Attempt to board moving train held negligence per se in Knight v. Railroad Co., 26 La.

In some jurisdictions, however, it cannot be affirmed, as a universal proposition of law, that it is negligence per se for a person to attempt to board a moving train. The age and physical condition of the person making the attempt, the rate of speed of the train, the nature of the car and of the place, and all the attendant facts and circumstances, enter into the question; and, while any one of these facts might possibly be sufficient to justify the conclusion of negligence as matter of law, ordinarily it is a question of fact for the jury; the test being whether a person of ordinary care and prudence would, under the circumstances, have made the attempt.[4] So, if a reasonable time has not been given a passenger to board the train, and its motion is so slight that no danger is apparent, his attempt to get on board is not negligence as matter of law, but the question is for the jury.[5] So the New York court of appeals has

Ann. 462; Denver, S. P. & P. R. Co. v. Pickard, 8 Colo. 163, 6 Pac. 149; Hays v. Railway Co., 51 Mo. App. 438; Missouri Pac. R. Co. v. Texas & P. R. Co., 36 Fed. 879; Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 34 Fed. 92; Harkey v. Railroad Co., 11 Fed. Cas. 522. Failure of a railroad company to stop its train for five minutes at a station, as required by statute, will not justify one in boarding the train, if such act, under the circumstances, was negligence contributing to the injury. Galveston, H. & S. A. R. Co. v. Le Gierse, 51 Tex. 189. It is contributory negligence, as matter of law, for a young man to attempt to jump on a train moving at least six or seven miles per hour, where the jump is made in opposition to, and not with, the direction in which the train is moving; and it is immaterial that the conductor told him to jump on. Heaton v. Railroad Co., 65 Mo. App. 479.

[4] North Birmingham Ry. Co. v. Liddicoat, 99 Ala. 545, 13 South. 18; Baltimore & O. R. Co. v. Kane, 69 Md. 11, 13 Atl. 387; Swigert v. Railroad Co., 75 Mo. 475.

[5] Johnson v. Railroad Co., 70 Pa. St. 357; Brooks v. Railroad Co.,

recently held that one who, at the conductor's bidding, attempts to board a train moving from two to three miles per hour, past an unobstructed station platform, at a station where trains do not stop, is not negligent per se.[6]

21 Wkly. Dig. (N. Y.) 464. It is not, as matter of law, contributory negligence for a passenger to attempt to board a car after a signal to start the train has been given, where the train is at rest when the signal is given. He may not know that the signal has been given, or, if he does know it, there may be reason to think that he can get on before the train actually starts. Dawson v. Railroad, 156 Mass. 127, 30 N. E. 466. In Texas the question whether an attempt to board a train in motion is contributory negligence is a matter of fact, to be determined by the jury. Texas & P. Ry. Co. v. Murphy, 46 Tex. 356. It is for the jury to ascertain whether, under all the facts, the effort was made to board the train when an ordinarily prudent man would not have attempted it. It is for the jury to determine whether the danger of boarding the train when in motion is so apparent as to make it the duty of one desiring to board it to refrain from the attempt. Kansas & G. S. L. Ry. Co. v. Dorough, 72 Tex. 108, 10 S. W. 711.

[6] Distler v. Railroad Co., 151 N. Y. 424, 45 N. E. 937, reversing 78 Hun, 252, 28 N. Y. Supp. 865. Commenting on the Hunter Case, 112 N. Y. 371, 19 N. E. 820; Id., 126 N. Y. 18, 26 N. E. 958,—the court said: "It may be said of the decisions in that case that in the first it was held that it was negligence per se to board a train moving from four to six, or six to eight, miles per hour, on account of its comparatively rapid motion; and, in the second, as the danger was manifest, unusual, and peculiar, and must have been understood, that, although moving at a less rate of speed, it was negligence, as matter of law, to attempt to board it while in close proximity to a prominent object, so situated that in case of failure, or of a misstep or other slight misadventure, the risk of being thrown against the obstruction and injured would be imminent."

§ 151. SAME—ALIGHTING FROM MOVING TRAIN.

All courts are united on the proposition that it is negligence, as matter of law, for a passenger to voluntarily jump from a rapidly moving train.[1] "If there be any man who does not know that such leaps are extremely dangerous, especially when taken in the dark, his friends should see that he does not travel by railroad." [2] So, also, to jump from a moving train in the dark is generally held to be negligence as matter of law.[3] The earlier cases seem to go still further, and to hold that in all cases a passenger who leaves a moving train is guilty of negligence, as matter of law, no

§ 151. [1] McLarin v. Railroad Co., 85 Ga. 504, 11 S. E. 840; Coleman v. Railroad Co., 84 Ga. 1, 10 S. E. 498; Dixon v. Railroad Co., 80 Ga. 212, 5 S. E. 496; Jarrett v. Railroad Co., 83 Ga. 347, 9 S. E. 681; Atlanta & W. P. R. Co. v. Dickerson, 89 Ga. 455, 15 S. E. 534; Barnett v. Railway Co., 87 Ga. 766, 13 S. E. 904; Watson v. Railway Co., 81 Ga. 476, 7 S. E. 854; Ohio & M. Ry. Co. v. Stratton, 78 Ill. 88; Houston & T. C. Ry. Co. v. Leslie, 57 Tex. 83; Missouri, K. & T. Ry. Co. v. Perry, 8 Tex. Civ. App. 78, 27 S. W. 496; Victor v. Railroad, 164 Pa. St. 195, 30 Atl. 381. A passenger who alights from a train moving so rapidly that she thinks she cannot alight in safety is guilty of contributory negligence, as matter of law. Williams v. Railway Co. (Tex. Civ. App.) 36 S. W. 329.

[2] Railroad Co. v. Aspell, 23 Pa. St. 147.

[3] Richmond & D. R. Co. v. Morris, 31 Grat. (Va.) 200; Jacob v. Railroad Co., 105 Mich. 450, 63 N. W. 502; Railway Co. v. Mayes, 58 Ark. 397, 24 S. W. 1076; East Tennessee, V. & G. Ry. Co. v. Holmes, 97 Ala. 332, 12 South. 286. But the rule is different if the passenger does not know that the train is moving. In such a case the question is whether the passenger ought to have known that the train was in motion, and it is error to direct a verdict for defendant on the theory that it is negligence for a passenger to alight from a moving train. Brooks v. Railroad, 135 Mass. 21.

matter how slowly the train may be moving.[4] But the general rule now is that courts will not, as matter of law, declare a person guilty of contributory negligence who attempts to leave a train while it is moving slowly, especially at a platform. The question as to whether the act constitutes negligence depends upon whether the danger was so obvious that a prudent person would not, under the circumstances, have made the attempt, and is to be determined by the jury upon a consideration of the rate of speed acquired by the train, the place, the conduct of those in charge of the train, and all the circumstances connected with the act of alighting.[5] Thus it has been held not negligence per

[4] Damont v. Railroad Co., 9 La. Ann. 441; Blodgett v. Bartlett, 50 Ga. 353; Secor v. Railroad Co., 10 Fed. 15; Lucas v. Railroad Co., 6 Gray (Mass.) 64; Gavett v. Railroad Co., 16 Gray (Mass.) 501. In a recent Massachusetts case it has been held to be contributory negligence, as matter of law, for a passenger to alight in a dark place from a moving train, under the belief that it has stopped, when the circumstances do not amount to an invitation to alight, or an assurance that it is safe to do so. England v. Railroad Co., 153 Mass. 490, 27 N. E. 1. So it has been held that, where a train stops a sufficient length of time to give passengers a reasonable opportunity to alight, a passenger is guilty of contributory negligence, as matter of law, in waiting until the train starts, and in jumping off while it is in motion. McClintock v. Railroad Co., 21 Wkly. Notes Cas. (Pa.) 133; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113; Illinois Cent. R. Co. v. Slatton, 54 Ill. 133; Central Railroad & Banking Co. v. Miles, 88 Ala. 256, 6 South. 696. The true basis for these decisions would seem to be the absence of negligence on the carrier's part.

[5] Little Rock & Ft. S. Ry. Co. v. Atkins, 46 Ark. 425; St. Louis, I. M. & S. Ry. v. Person, 49 Ark. 182, 4 S. W. 755; Little Rock & Ft. S. Ry. Co. v. Tankersley, 54 Ark. 25, 14 S. W. 1099; Carr v. Railroad Co., 98 Cal. 366, 33 Pac. 213; Covington v. Railroad Co., 81 Ga. 273, 6 S. E. 593; Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 38 N. E. 578; Illinois Cent. R. Co. v. Able, 59 Ill. 131; Pennsylvania Co. v. Marion,

se to leave a train moving three miles per hour,[6] or even five miles per hour.[7] But when the rate of speed

123 Ind. 415, 23 N. E. 973; Louisville & N. R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48; Louisville, E. & St. L. C. R. Co. v. Bean, 9 Ind. App. 240, 36 N. E. 443; Nichols v. Railroad Co., 68 Iowa, 732, 28 N. W. 44; Raben v. Railroad Co., 74 Iowa, 732, 34 N. W. 621; Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 491, 40 Pac. 919; Cumberland Val. R. Co. v. Maugans, 61 Md. 53; McCaslin v. Railway Co., 93 Mich. 553, 53 N. W. 724; Strand v. Railway Co., 64 Mich. 216, 31 N. W. 184; Georgia Pac. Ry. Co. v. West, 66 Miss. 310, 6 South. 207; Schaefer v. Railway Co., 128 Mo. 64, 30 S. W. 331; Fulks v. Railway Co., 111 Mo. 335, 19 S. W. 818; Leslie v. Railroad Co., 88 Mo. 50; Waller v. Railroad Co., 83 Mo. 608; Clotworthy v. Railroad Co., 80 Mo. 220; Straus v. Railroad Co., 75 Mo. 185; Price v. Railroad Co., 72 Mo. 414; Kelly v. Railroad Co., 70 Mo. 604; Doss v. Railroad Co., 59 Mo. 27; Taylor v. Railway Co., 26 Mo. App. 336; Jackson v. Railway Co., 29 Mo. App. 495; Richmond v. Railway Co., 49 Mo. App. 104; Nance v. Railroad Co., 94 N. C. 619; Thomas v. Railroad Co., 38 S. C. 485, 17 S. E. 226; Louisville & N. R. Co. v. Stacker, 86 Tenn. 343, 6 S. W. 737; Galveston, H. & S. A. Ry. Co. v. Smith, 59 Tex. 406; Kelly v. Railroad Co., 70 Wis. 335, 35 N. W. 538; Jones v. Railroad Co., 4 App. D. C. 158, affirming 21 D. C. 346; Edgar v. Railway Co., 11 Ont. App. 452. "If the train stops, and does not remain a reasonable time, and a passenger, to avoid being carried beyond his destination, gets off a slowly starting train, and he is thus injured, he is not guilty of contributory negligence. If, however, the train only slows up, and does not stop, and is moving with accelerating speed, and a passenger had knowledge, or by reasonable observation might have obtained knowledge, of such increasing movement, and he jumped off and is injured, he is guilty of contributory negligence, and cannot recover." McSloop v. Railroad Co., 59 Fed. 431. In Texas, it is generally held that the attempt to leave a moving train is not negligence per se, and the jury must determine whether the attempt and method of its execution constitute contributory negligence. International & G. N. R. Co. v. Satterwhite (Tex. Civ. App.) 38 S. W.

[6] Suber v. Railway Co., 96 Ga. 42, 23 S. E. 387.

[7] New York, P. & N. R. Co. v. Coulbourn, 69 Md. 360, 16 Atl. 208.

is six miles per hour, or more, the courts generally hold it to be negligence per se to jump therefrom.[8]

401. And this rule obtains even though the conductor tells the passenger that the train will stop at the station. Missouri, K. & T. Ry. Co. v. Meyers (Tex. Civ. App.) 35 S. W. 421. A passenger about 70 years old, and large and corpulent, arose from his seat in the smoking car as soon as the train stopped at his destination, made his way to the door as speedily as possible, but when he reached the door he was delayed by a group of incoming passengers. He pushed his way through them; and, when he reached the last, or next to the last, step leading down from the platform, he discovered that the train had commenced to move. The impetus which he had acquired rendered it difficult for him to stop himself, and he was thrown to the ground. Held, that the question of his contributory negligence in attempting to leave a moving car was for the jury. Pennsylvania R. Co. v. Peters, 116 Pa. St. 206, 9 Atl. 317. A passenger started to leave a train as soon as it stopped. The stop was momentary,—less than a minute,—but she did not know that the train had started till she reached the car platform, and had descended one of the car steps. She then sought to return to the train, but became dizzy in attempting to turn around, and fell backward from the car. Held, that she was not guilty of contributory negligence, as matter of law. Mahar v. Railroad Co., 5 App. Div. 22, 39 N. Y. Supp. 63. A passenger who is in the act of stepping from the lower car step to the station platform when the train starts may step off if he believes he can do so with reasonable safety, without being guilty of negligence, as matter of law. Sanderson v. Railway Co., 64 Mo. App. 655. Where the testimony is conflicting as to whether the train was in motion when plaintiff started to descend from the car, the question of plaintiff's contributory negligence is for the jury. Enches v. Railroad Co., 135 Pa. St. 194, 19 Atl. 939.

[8] Six miles: Reibel v. Railroad Co., 114 Ind. 476, 17 N. E. 107; Lake Shore & M. S. Ry. Co. v. Bangs, 47 Mich. 470, 11 N. W. 276; Dewald v. Railroad Co., 44 Kan. 586, 24 Pac. 1101; Central Railroad & Banking Co. v. Letcher, 69 Ala. 106. Six to ten miles: Scully v. Railroad Co., 80 Hun, 197, 30 N. Y. Supp. 61. Ten or twelve miles: Jeffersonville R. Co. v. Swift, 26 Ind. 459. Eighteen miles: Brown v. Railroad Co., 80 Wis. 162, 49 N. W. 807. "If to get on or off a train running at the rate of four miles an hour is not negligence per

§ 152. SAME—AGGRAVATING CIRCUMSTANCES.

Aggravating circumstances may exist which impel courts to declare an attempt to get on or off a moving train negligence per se, though in the absence of such circumstances the question might be one of fact for the jury. Thus the attempt of a passenger incumbered with bundles to leave a moving train is generally held to be negligence per se.[1] So it is contributory negligence, as matter of law, for a passenger carrying a 12 year old girl in one arm to attempt to leave a train which was in motion before he got out of the car, and

se, would such an act be so regarded if the train was running at twice that rate of speed? In our opinion, it would be, and this opinion is based on our knowledge and experience in such matters. While we are satisfied with this conclusion, yet we must confess it has the appearance of being somewhat arbitrary. But the limit must be placed somewhere." Murphy v. Railway Co., 43 Mo. App. 342.

§ 152. [1] Toledo, St. L. & K. C. R. Co. v. Wingate, 143 Ind. 125, 42 N. E. 477, affirming 37 N. E. 274; Pennsylvania Co. v. Hixon, 10 Ind. App. 520, 38 N. E. 56; Burrows v. Railway Co., 63 N. Y. 556, reversing 3 Thomp. & C. (N. Y.) 44; South & N. A. R. Co. v. Schautler, 75 Ala. 136. A drover accompanying stock, who, in the nighttime, with one hand filled with a lantern and a prod pole, attempts to climb on a freight car, when its speed is so great and increasing as to induce a belief in his mind that it will be unsafe for him to get onto the caboose when it reaches him, is guilty of contributory negligence, as matter of law. McCorkle v. Railway Co., 61 Iowa, 555, 16 N. W. 714. A drover, who, with a valise in his hands, attempts to climb the ladder of a moving freight car, is guilty of contributory negligence, as matter of law. Richmond & D. R. Co. v. Picklesimer, 89 Va. 389, 16 S. E. 245; Id., 85 Va. 798, 10 S. E. 44. It is negligence, as matter of law, for a person, both of whose arms are full of bundles, to attempt to board a train moving from four to seven miles per hour. Birmingham Electric Co. v. Clay, 108 Ala. 233, 19 South. 309.

had passed the station platform when he made the attempt.[2] So, also, a passenger who persists in an attempt to alight from a moving train, after he has been warned by the conductor or other train hands not to do so, is guilty of contributory negligence, as matter of law.[3] So, where a female passenger makes the attempt in face of a warning from a fellow passenger that the train is in motion. Though she is not bound to yield obedience to the warning, she disregards it at her peril, and takes the risk of exposing herself unnecessarily to known danger.[4] And a passenger who attempts to alight from a moving train, after two other passengers who had preceded him were thrown down in the attempt, is guilty of contributory negligence, as matter of law.[5] It is contributory negligence, as matter of law, for a passenger to jump in the nighttime from the side door of the baggage compartment of a smoking car, while the train is moving slowly, even though the rear door of the car was locked, where the front door was open.[6]

2 Morrison v. Railway Co., 56 N. Y. 302.

3 Ohio & M. R. Co. v. Schiebe, 44 Ill. 460; Nelson v. Railroad Co., 68 Mo. 593; Jewell v. Railway Co., 54 Wis. 610, 12 N. W. 83.

4 Kilpatrick v. Railroad Co., 140 Pa. St. 502, 21 Atl. 408.

5 Brown v. Barnes, 151 Pa. St. 562, 25 Atl. 144. It is negligence for a passenger to attempt to alight at a point not a regular stopping place while the train is in motion. Louisville, N. A. & C. Ry. Co. v. Johnson, 44 Ill. App. 56.

6 Geogagn v. Railroad Co., 10 App. Div. 454, 42 N. Y. Supp. 205.

§ 153. SAME—MITIGATING CIRCUMSTANCES.

Fright and dismay caused at the prospect of being carried beyond his destination does not excuse the act of a passenger in jumping from a rapidly moving train.[1] In a recent case,[2] the supreme court of Louisiana says: "We consider the law to be settled by the overwhelming weight of authority that, while a railroad company is bound to stop its train at a station to which it has contracted to carry a passenger, and to land him safely and conveniently, the fact that the train is about to pass such a station without stopping does not justify the passenger in jumping off the moving train, unless expressly or impliedly invited to do so by the company." Even the anxiety of the passenger to see his sick child does not relieve him from the legal consequences of his reckless conduct in jumping from a rapidly moving train.[3] So the negligence of a railroad company which leads a passenger to get upon a wrong train is no excuse for his jumping from the train while it is moving at a rapid rate.[4]

§ 153. [1] Toledo, St. L. & K. C. R. Co. v. Wingate, 143 Ind. 125, 42 N. E. 477; Dougherty v. Railroad Co., 86 Ill. 467; Illinois Cent. R. Co. v. Chambers, 71 Ill. 519; Illinois Cent. R. Co. v. Lutz, 84 Ill. 598.

[2] Walker v. Railroad Co., 41 La. Ann. 795, 6 South. 916.

[3] Burgin v. Railway Co., 115 N. C. 673, 20 S. E. 473.

[4] Rothstein v. Railroad Co., 171 Pa. St. 620, 33 Atl. 379; Whelan v. Railroad Co., 84 Ga. 506, 10 S. E. 1091. A passenger who is informed by the ticket agent at the station that the train is an hour late has no right to infer from such statement that the train will be an hour behind its scheduled time when it reaches the station; and if he leaves the station, and returns just as the train is about to pull

But where the danger is not imminent, and where persons of ordinary care and caution would make the attempt, it is not necessarily negligence for a passenger to attempt to leave a train which has not stopped at his destination.[5] So, where a railroad train starts while a female passenger, accompanied by her children, is engaged in getting off the train, she is not guilty of contributory negligence, as matter of law, in jumping from the car steps to the platform, where one of her children has fallen prostrate.[6] And where women waiting for a train in a passenger station are invited by the station agent to take seats in an empty car while the waiting room is being cleansed, it is a question of fact for the jury whether it is negligence to jump from the car when the train to which it is attached begins to move, without signal or notice of any kind, startling the women, and alarming them lest they might be carried away from their intended destination.[7]

out, such statement furnishes no excuse for his boarding it while in motion. Ohio & M. R. Co. v. Allender, 59 Ill. App. 620. The mere fact that a conductor agrees to stop the train for a passenger at a station where it does not usually stop, and that the bell is rung as it approaches the station, does not authorize the passenger to assume that the train has stopped after it passed the platform, when in fact it was in motion, and had been seen by the passenger to be in motion a few seconds before, as it passed the platform; and the passenger cannot recover for injuries sustained in jumping from the moving train, though he believed it to have stopped when he made the jump. East Tennessee, V. & G. R. Co. v. Massengill, 15 Lea (Tenn.) 328.

[5] Cousins v. Railway Co., 96 Mich. 386, 56 N. W. 14.

[6] Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 292; Loyd v. Railway Co., 53 Mo. 509.

[7] Shannon v. Railroad Co., 78 Me. 52, 2 Atl. 678.

§ 154. SAME — ADVICE OR COMMAND OF TRAIN HANDS.

The mere fact that a passenger acts on the advice or command of the conductor does not justify him in attempting to alight from a train when it is obviously dangerous to do so; and the fault of the conductor in this respect will not relieve the passenger from the consequences of his own reckless acts. But if the train is moving very slowly, and the passenger, upon the suggestion or request of those in charge of the train, attempts to alight, and is injured, it is a proper question for the jury whether it was a prudent or ordinarily careful act, or whether it was a rash and reckless exposure to peril and hazard.[1] The passenger has a right to expect that the carrier has employed a skillful and prudent conductor, who will not expose passengers to dangerous risks, and who has experience and knowledge in his business sufficient to correctly advise

§ 154. [1] Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 491, 40 Pac. 919; St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519; East Tennessee, V. & G. Ry. Co. v. Hughes, 92 Ga. 388, 17 S. E. 949; Jones v. Railway Co., 42 Minn. 183, 43 N. W. 1114; Filer v. Railroad Co., 49 N. Y. 47, 59 N. Y. 351, 68 N. Y. 124; Bucher v. Railroad Co., 98 N. Y. 128; Lewis v. Canal Co., 145 N. Y. 508, 40 N. E. 248, affirming 80 Hun, 192, 30 N. Y. Supp. 28; Watkins v. Railroad Co., 116 N. C. 961, 21 S. E. 409; Pittsburgh, C. & St. L. Ry. Co. v. Krouse, 30 Ohio St. 222; Delaware & H. Canal Co. v. Webster (Pa. Sup.) 6 Atl. 841; Gulf, C. & S. F. Ry. Co. v. Brown, 4 Tex. Civ. App. 435, 23 S. W. 618; Texas & P. Ry. Co. v. Bagwell, 3 Tex. Civ. App. 256, 22 S. W. 829; Texas & N. O. Ry. Co. v. Bingham, 2 Tex. Civ. App. 278, 21 S. W. 569; Eddy v. Wallace, 1 C. C. A. 435, 19 Fed. 801; Thomson v. Commissioner of Railways, 2 Sup. Ct. N. S. Wales, 292.

and direct passengers as to the proper time and manner of alighting safely from the train.[2] So it is not negligence for a female passenger to alight from a moving train at a station, if she is told to do so by the conductor, who assists her, against her remonstrance that she cannot get off.[3] Neither is a passenger guilty of negligence, as matter of law, in attempting, at a station, to board a slowly moving train, which has slacked its speed to two miles an hour in response to his signal, where the conductor directs him to get on the cars, by calling to him "All aboard!"[4]

[2] Lambeth v. Railroad Co., 66 N. C. 494.

[3] Jones v. Railway Co., 47 La. Ann. 383, 16 South. 937. A female passenger, who has had no sufficient opportunity to alight, and who is about to be carried away from a three months old babe, is not, as matter of law, guilty of contributory negligence in getting off the moving train, in obedience to a direction by a brakeman to "jump quick," before the train got faster. Ft. Worth & D. C. Ry. Co. v. Viney (Tex. Civ. App.) 30 S. W. 252. One who is injured in jumping from a moving railroad train, pursuant to an order or direction of the conductor, who is ejecting him, cannot be charged with contributory negligence. International & G. N. Ry. Co. v. Hassell, 62 Tex. 256. A 13 year old boy is not chargeable with contributory negligence in jumping from a moving train, where he was compelled to do so by the throwing of water in his face by one of the company's employés. Clark v. Railroad Co., 40 Hun, 605.

[4] Montgomery & E. R. Co. v. Stewart, 91 Ala. 421, 8 South. 708. "The danger of the attempt to board not being obvious, the law is well, and has been long, settled that the plaintiff was in no wise negligent, or lacking in due care, to rely upon the assurance thus impliedly given by the employé that it was safe to make the attempt to board, in compliance with the conductor's direction." Id. See, also, Curry v. Railway Co., 17 Ont. 65. It is a question for the jury whether a shipper of stock is guilty of negligence in attempting to climb the ladder of a freight car, where the train has begun to move unexpectedly, and he is urged to make the attempt by the conductor.

But no advice or command of the conductor will justify a passenger in jumping from a train moving at full speed. As well might he obey the conductor's suggestion to put himself on the track before the advancing wheels of the locomotive.[5]

So, while a passenger may be justified in obeying the directions of a railroad employé to get off a moving train, he has no right to obey such direction given by one having no connection with the train other than as passenger. When the conductor or a brakeman directs a passenger to get off the train, although in motion, the passenger will naturally assume that he knows it to be entirely safe, or he would not have given the direction. But as to a fellow passenger, there is no reason to suppose that he knows anything more about whether it is safe to follow his direction than the one to whom it is given.[6]

Sometimes, of course, it is quite important to deter-

Missouri Pac. Ry. Co. v. Tietken (Neb.) 68 N. W. 336. The act of a 15 year old boy in attempting to get on a moving engine is not excused by the fact that the engineer waved his hand, and that a switchman told the boy that he thought the engineer wanted to speak with him. Connaughton v. Railroad Co., 13 Misc. Rep. 401, 34 N. Y. Supp. 243.

[5] St. Louis, I. M. & S. Ry. Co. v. Rosenberry, 45 Ark. 256; Bardwell v. Railroad Co., 63 Miss. 574; Rothstein v. Pennsylvania R. Co., 171 Pa. St. 620, 33 Atl. 379; Durham v. Railroad Co. (Ky.) 29 S. W. 737; Whitlock v. Comer, 57 Fed. 565. Liability is imposed on the carrier for only such acts of the servant or employé as are within the scope of his employment; and the advice of a porter or brakeman to a passenger that it would not be dangerous to get off a moving train cannot be considered as the discharge of a delegated duty. Missouri, K. & T. Ry. Co. v. Perry, 8 Tex. Civ. App. 78, 27 S. W. 496.

[6] Filer v. Railroad Co., 59 N. Y. 351, 68 N. Y. 128.

mine what words by a conductor amount to an advice or command to leave a moving train. The words "Jump quick, if you are going to," addressed by a conductor to a passenger as the train is leaving the station of his destination, are merely words of advice, and do not amount to a positive direction to get off.[7] "Jump with the train," or "Don't jump sideways," is not an advice or direction to leave the train, but merely a suggestion of the safest method of doing so if the passenger is resolved on making the attempt.[8] A statement by a conductor to a passenger, anxious to get off as soon as possible, that passengers sometimes get off at a point 50 or 60 feet from the station, while the train is in motion, is not equivalent to a direction or order by the conductor to get off at that place.[9] So the silence of the conductor, on hearing another passenger tell plaintiff that the car is not going to stop, and that he had better get off, will not justify him in jumping from the car.[10] But the words, "You get off," address-

7 Vimont v. Railway Co., 71 Iowa, 58, 32 N. W. 100.

8 McDonald v. Railroad, 87 Me. 466, 32 Atl. 1010.

9 Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 373. A statement by a conductor to a passenger, who demurs to jumping from the train as it is passing the station platform, that he could take the risk if he would, does not amount to an order or direction to jump from the train. Jeffersonville R. Co. v. Swift, 26 Ind. 459.

10 Masterson v. Railway Co., 88 Ga. 436, 14 S. E. 591. An announcement of the name of a station, and a statement "All out for" such station, made by the conductor, does not justify a passenger in getting off the train, in the dark, several hundred yards from the station, and while it is running 18 or 20 miles an hour. Louisville & N. R. Co. v. Depp (Ky.) 33 S. W. 417. An expression of opinion by a conductor that a passenger can leap from a train in safety at a station at which it does not stop does not relieve the passenger of

ed by a brakeman to the escort of a female passenger after the car is in motion, and while the parties are on the car platform, accompanied by the brakeman's act in shutting the vestibule door of the car after the escort is on the car steps, are a positive order, and not mere information, advice, or opinion; and the passenger is not, as matter of law, guilty of contributory negligence in obeying it.[11] And where the conductor pulls the bell rope as a signal for the engineer to stop as the train is leaving the station, and opens the door of a vestibule car, and informs a passenger, "You can get off now," the question whether the passenger is guilty of contributory negligence in stepping from the train in the dark, under the belief that it had stopped, is for the jury, though it was still in motion.[12]

§ 155. SAME—STATUTORY PROVISIONS.

Statutory prohibitions, more or less sweeping, against getting on or off moving trains, exist in many of the states. In New Jersey it is provided that one injured by jumping on or off a car while in motion shall be deemed to have contributed to the injury sustained, and shall not recover any damages therefor.[1] In Iowa it is made a misdemeanor for any person to

the duty to exercise his judgment whether or not such a leap is safe; and if the conductor only gives it as matter of opinion, still, if the danger is so apparent that a prudent man, similarly situated, would not have attempted to leap from the train, then the passenger was guilty of negligence, and should not be permitted to recover. Chicago & A. R. Co. v. Randolph, 53 Ill. 510.

11 Galloway v. Railway Co., 87 Iowa, 458, 54 N. W. 447.

12 Evansville & T. H. R. Co. v. Athon, 6 Ind. App. 295, 33 N. E. 469.

§ 155. 1 Revision N. J. p. 920, § 67.

get on or off a moving train, without the consent of the person having the same in charge.[2] Under this statute, it is contributory negligence, as matter of law, in all cases for a passenger to get off a moving train without the conductor's consent. The law will not afford a party a remedy for an injury sustained by him as the consequence of his own act, when it has forbidden him in advance to do that act.[3] The conductor's consent, however, need not be express, but it may be inferred from his conduct. This inference is for the jury as one of fact, and it is error for the court to determine it as one of law.[4] But, though plaintiff testifies that some one told him to jump off, yet where he is an experienced railroad man, and is unable to state whether it was the conductor who addressed him, and the conductor and brakeman each testify that neither of them told plaintiff any such thing, a verdict in plaintiff's favor cannot be sustained.[5]

[2] Acts 16th Gen. Assem. c. 148 (McClain's Ann. St. 1884, p. 985). Laws N. Y. 1878, c. 261, makes it a misdemeanor for any person not a railroad employé to get on or off a freight car or engine in motion. In other states it is declared unlawful for any one, not a passenger or an employé, to get on or off moving trains. Rev. St. Ind. 1894, § 2290; Gen. St. Ky. 1894, § 805; 2 How. Ann. St. Mich. § 9122; Ann. Code Miss. § 1272.

[3] Raben v. Railway Co., 74 Iowa, 732, 34 N. W. 621. It makes no difference that a female passenger, whose children were already on the station platform when the train started, was impelled to get off by the fear of being carried away from her children, or that she had reason to believe that she could do so in safety. Id. One who is injured while boarding a moving train, in violation of statute, cannot recover. Young v. Railway Co. (Iowa) 69 N. W. 682.

[4] Raben v. Railway Co., 74 Iowa, 732, 34 N. W. 621.

[5] Herman v. Railway Co., 79 Iowa, 161, 44 N. W. 298.

§ 156. BOARDING MOVING STREET CAR.

The strict rules laid down in the preceding sections, as to attempts to board or alight from moving trains propelled by steam, are not applicable to attempts to board or alight from moving street cars. "Ordinarily, it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, where the car is moving rapidly, or where the person is infirm or clumsy, or is incumbered with children, packages, or other hindrances, or where there are other unfavorable conditions, where it would be reckless to do so; and a court might, upon undisputed evidence, hold as matter of law that there was negligence in doing so. But in most cases it must be a question for the jury." [1] Numerous cases support the proposition that it is not, as matter of law, contributory negligence for a person to board a slowly moving street car which has been signaled to stop.[2]

§ 156. [1] Eppendorf v. Railroad Co., 69 N. Y. 195.

[2] Id.; Conner v. Railway Co., 105 Ind. 62, 4 N. E. 441; Sahlgaard v. Railway Co., 48 Minn. 232, 51 N. W. 111; Valentine v. Railroad Co. (Com. Pl.) 4 N. Y. Supp. 481; McSwyny v. Railroad Co., 54 Hun, 637, 7 N. Y. Supp. 456; Seitz v. Railroad Co. (Com. Pl.) 10 N. Y. Supp. 1; Morrison v. Railroad Co., 130 N. Y. 166, 29 N. E. 105, affirming 55 Hun, 608, 8 N. Y. Supp. 436; Thompson v. Macklem, 2 U. C. Q. B. 300; West Chicago St. R. Co. v. Dudzik, 67 Ill. App. 681. It is not negligence per se for a person to get on or off a street car drawn by horses while it is in motion. It depends upon the circumstances surrounding each case, and the question is ordinarily one of fact, to be submitted to the jury. Schacherl v. Railway Co., 42 Minn. 42, 43 N. W. 837. Whether it is negligence or not for a person to at-

But an attempt to board a cable car running at full speed is negligence.[3] And a passenger about to board a slowly moving street car must observe whether there are any obstacles outside the car in plain sight which make it dangerous for him to get on board; and therefore a passenger who is struck by a truck just after he has gotten on the car steps, and before the car has gone eight feet, cannot recover.[4] So one who attempts to get on a horse car while it is in motion, after being directed to wait until it stops, and who persists in the attempt to get on board, and is injured by running

tempt to board a moving street car is generally a question for the jury, taking into consideration all the circumstances in evidence in the case. Omaha St. Ry. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007. Whether or not a man 68 years old, and weighing 200 pounds, is guilty of contributory negligence in attempting to board a horse car, after he has signaled the driver, and after the car has slowed up, and is moving about four miles an hour, is a question for the jury; nor can the court say, as matter of law, that his attempt to board the car under these circumstances is negligence, even if no signal is known to have been given to the driver. Briggs v. Railway, 148 Mass. 72, 19 N. E. 19. Whether a passenger, in getting on a horse car while it is in motion, is or is not in the exercise of due care, is a matter for the determination of the jury, under all the circumstances of the case. North Chicago St. Ry. Co. v. Williams, 140 Ill. 275, 29 N. E. 672; Id., 20 Ill. App. 275. One injured in an attempt to board a street car cannot recover if the car was moving at its usual rate of speed,—eight or nine miles an hour; but he is entitled to recover if the car had stopped, or was in the act of stopping, or was in such condition of running or stopping as induced him to think it was about to stop. Walters v. Traction Co., 161 Pa. St. 36, 28 Atl. 941.

[3] Chicago City R. Co. v. Delcourt, 33 Ill. App. 430.

[4] Moylan v. Railroad Co., 128 N. Y. 583, 27 N. E. 977, reversing 59 Hun, 619, 13 N. Y. Supp. 494.

against the arm of a passenger, put up to prevent her from taking hold of the car, is guilty of negligence.[5]

No distinction exists between the rules applicable to street cars drawn by horses and street cars propelled by electricity. It is true that electric cars are generally run at a higher rate of speed than horse cars. But electric cars are designed for the transportation of passengers along the public streets, and are as easily controlled as horse cars. No reason, therefore, exists for applying to electric cars rules of law not applicable to horse cars.[6]

[5] Gallagher v. Railway Co., 156 Mass. 157, 30 N. E. 480. A passenger who attempts to get on board a moving street car, especially if the conductor is inside, must be held to a reasonable degree of care. Picard v. Railway Co., 147 Pa. St. 195, 23 Atl. 566. The boarding of an elevated railway train by a passenger as the gate is closing, and persisting, against an effort to remove him, in the precarious position thus obtained, is such contributory negligence as bars recovery for his death in consequence of that position. Robinson v. Railway Co., 5 Misc. Rep. 209, 25 N. Y. Supp. 91.

[6] Corlin v. Railway, 154 Mass. 197, 27 N. E. 1000; Schepers v. Railway Co., 126 Mo. 665, 29 S. W. 712. "As to the question of contributory negligence in boarding or leaving a moving street car, no distinction exists because of a difference in the motive power, as electricity and horse power. No authority is cited to sustain the distinction, nor are we able to see any ground for any material difference in the rules of law to be applied, since the objects and general methods and purposes of street railways remain the same, whatever the motive power." Citizens' St. R. Co. v. Spahr, 7 Ind. App. 23, 33 N. E. 446. "Electricity as a motive power, while stronger and more powerful, and with possibilities of a greater speed, is at the same time more nearly under control of the person in charge, than horse power. The strict rule in force regarding the negligence of a person alighting or boarding an ordinary train of steam cars had for it many good and sufficient reasons, which are not applicable to the electric car, as in general use. In the latter case, stops are frequent, and oppor-

§ 157. SAME—ALIGHTING FROM MOVING STREET CAR.

It is not contributory negligence, as matter of law, for a passenger to attempt to leave a slowly moving street car.[1] The court cannot say, as matter of law,

tunity for great speed is not presented. Steps for passengers are near the ground, and the chances of a misstep or fall are not so great as in steam cars, as constructed. Streets on such lines are generally paved, and in that respect passengers may as safely depart or board such cars in one place as in another, whereas, in the case of steam cars, platforms are generally provided. While in electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approaches to that of horse cars that it must be held that the same rule of law which holds that it is not negligence per se to board or depart from such cars while in motion is also applicable to electric cars." Cicero & P. St. Ry. Co. v. Meixner, 160 Ill. 320, 43 N. E. 823. But in Denver Tramway Co. v. Reid (Colo. Sup.) 45 Pac. 378, it was said: "In the last few years horses have been almost entirely displaced as a motive power on street-car lines in cities by cables and electricity, and the operation of cars and trains correspondingly accelerated. As transit becomes more rapid, the dangers incident to street-railway traffic are correspondingly augmented, and as the danger is increased, the law exacts greater care on the part of both the carrier and the passenger. For this reason many of the decisions applicable to passengers on horse cars are inapplicable to the newer modes of transportation. The cable and electric service of to-day more nearly resembles the ordinary railway train, and the case law which has grown up with reference to the latter is more in point."

§ 157. [1] Chicago City Ry. Co. v. Mumford, 97 Ill. 560; Munroe v. Railroad Co., 50 N. Y. Super. Ct. 114; Mettlestadt v. Railroad Co., 4 Rob. (N. Y.) 377; Brown v. Railway Co. (Wash.) 47 Pac. 890. A passenger who has signaled an electric motor to stop, and who steps on the running board after the car has slowed down, is not guilty of negligence, as matter of law, in letting go his hold of an upright support on the car, preparatory to alighting, and he is not thereby debarred from recovering for injuries sustained by a sudden and vio-

that to alight from a street car in motion, at however small a rate of speed, is contributory negligence, but the question is one of fact for the jury.[2] But it is negligence, as matter of law, for a passenger to jump from a car going at full speed.[3] So a passenger on an electric street car, who either steps off the car while it is

lent forward jerk of the car, in response to a signal by the conductor to go ahead. Walters v. Railroad Co., 95 Ga. 519, 20 S. E. 497.

[2] Rathbone v. Railroad Co., 13 R. I. 709; Ober v. Railroad Co., 44 La. Ann. 1059, 11 South. 818; Duncan v. Railway Co., 48 Mo. App. 659. Whether alighting from a moving street car, operated by an endless cable, is negligence, is a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case. Omaha St. Ry. Co. v. Craig, 39 Neb. 601, 58 N. W. 209. A passenger who discovers that she is on a wrong street car as soon as she gets on, and who so informs the conductor, and starts to get off while the car is standing, and has gotten her foot on the running board of the car when it starts, is not, as matter of law, guilty of negligence in continuing her descent from the car after it has started. Lacas v. Railway Co., 92 Mich. 412, 52 N. W. 745. A female passenger is not guilty of contributory negligence, as matter of law, in jumping from a street car as it is being driven into the car barn, regardless of her signal to stop, where on a former occasion indecent proposals were made to her in the barn. Ashton v. Railway Co., 78 Mich. 587, 44 N. W. 141. An elevated train on which plaintiff was a passenger did not go to his destination, and passengers were required to change cars. Plaintiff was ignorant of this fact, and the car started before he got off. The guard opened the gate, and told him to jump, and plaintiff did so before the train had passed the station platform. Held, that his contributory negligence was for the jury, and not the court. Geller v. Railway Co., 11 Misc. Rep. 413, 32 N. Y. Supp. 254. It has even been held not negligence per se for a 17 year old boy to jump from a horse car in rapid motion. Wyatt v. Railroad Co., 55 Mo. 485, 62 Mo. 408. But it is questionable whether this case would be followed now.

[3] Masterson v. Railroad Co., 88 Ga. 436, 14 S. E. 591; Denver T. Co. v. Owens, 20 Colo. 107, 36 Pac. 848.

running from 7 to 12 miles an hour, or else is on the car step, in the act of getting off, and is jerked off by the motion of the car, is guilty of contributory negligence as matter of law.[4] It has even been held to be contributory negligence, as matter of law, for a passenger to alight from an electric car running four or five miles per hour.[5] So a passenger who, without notice to any one, rings the bell, and without the knowledge of the driver or conductor proceeds to get off, acts at her peril, and cannot recover for injuries sustained by the sudden starting of the car while she is alighting.[6]

4 Saiko v. Railway Co. (Minn.) 69 N. W. 473.

5 Jagger v. Railway Co. (Pa. Sup.) 36 Atl. 867.

6 Nichols v. Railroad Co., 106 Mass. 463. The failure of the conductor to immediately stop a street car when requested by a passenger does not excuse the contributory negligence of the passenger in jumping from the rapidly moving car. Hagan v. Railway Co., 15 Phila. 278. An electric railway company is not bound by its employés' practice in slacking the speed of a car to enable a particular passenger to alight, while the car is in motion, at a point where no stop is ordinarily made. Jagger v. Railway Co. (Pa. Sup.) 36 Atl. 867. A female passenger on a train of street cars pulled by a dummy steam engine is guilty of contributory negligence in attempting to get off the car while in motion, in violation of the rules of the company, and without any act on the part of the train hands to cause her to take the step. Calderwood v. Railway Co., 96 Ala. 318, 11 South. 66; North Birmingham St. Ry. Co. v. Calderwood, 89 Ala. 247, 7 South. 360. A passenger on a street car, who delays in attempting to alight at the terminus of the line until he sees the horses passing along the side of the car, for the purpose of being attached to the other end, so as to proceed on the return trip, is guilty of negligence in persisting in the attempt after the car is in motion. Dickson v. Railroad Co., 33 N. Y. Super. Ct. 330. Though a street-car driver has failed to stop when requested by a passenger, yet the latter cannot recover for injuries sustained in alighting from the car in motion by reason of a sudden jerk, where he did not again notify the driver

§ 158. SAME—FRONT PLATFORM.

There is no rule of law that boarding the front platform of a street car when in motion is negligence.[1] The fact that the attempt is made at the front platform is undoubtedly a circumstance to be considered in connection with the fact that the car was at the time in motion, yet neither one of these circumstances, nor both of them together, can, as matter of law, be held to constitute negligence.[2] But one who attempts to board the front platform of a moving trolley car is bound to exercise the care of a reasonably prudent person, and more care is necessary than if he had wait-

of his intention to alight, and it does not appear that the latter knew of this fact when he started up his horses. Outen v. Railroad Co., 94 Ga. 662, 21 S. E. 710. Where the issue is whether a passenger was thrown from the car by its sudden starting while attempting to alight, or whether she attempted to step from it while in motion, an instruction is proper that plaintiff cannot recover if she failed to exercise ordinary care on her part, as by leaving the car when in motion. Central Ry. Co. v. Smith, 74 Md. 212, 21 Atl. 706. Where a street car is being slowed down in response to a passenger's signal and he undertakes to get off before the car has stopped, the company is not liable for injuries sustained by reason thereof, since it is guilty of no negligence. Saffer v. Railroad Co., 53 Hun, 629, 5 N. Y. Supp. 700.

§ 158. [1] McDonough v. Railroad Co., 137 Mass. 210. To attempt to board a moving cable car by the front platform is not negligence per se, where the car has slackened speed in response to plaintiff's signal. Finkeldey v. Cable Co., 114 Cal. 28, 45 Pac. 996.

[2] Stager v. Railway Co., 119 Pa. 70, 12 Atl. 821. Where a 13 year old boy riding on the front platform states that he is going to get off, and the driver slackens speed, the question whether he is guilty of contributory negligence in getting off before the car has come to a full stop is for the jury. Crissey v. Railway Co., 75 Pa. 83.

ed to board the rear step, or for the car to stop.[3] An attempt to board the front platform of an electric street car, moving at its ordinary rate of speed of seven or eight miles an hour, is negligence per se.[4] And so is the attempt to alight from the front platform of a horse car moving at full speed, though the passenger is directed to get off by the driver.[5] So it is negligence per se for a 15 year old boy to attempt to board a moving street car at the front platform, where the step is entirely off, though he made the attempt at the invitation of the driver.[6]

[3] Paulson v. Railroad Co., 34 N. Y. Supp. 244, 13 Misc. Rep. 387.

[4] Woo Dan v. Power Co., 5 Wash. 466, 32 Pac. 103.

[5] Ginnon v. Railroad Co. (1864) 3 Rob. (N. Y.) 25. An 11 year old boy, who is a passenger on a street car, is guilty of contributory negligence, as matter of law, in jumping off the front platform, with his back to the horses, and without asking the driver to stop. Purtell v. Railway Co., 3 Pa. Co. Ct. R. 273.

[6] Dietrich v. Railway Co., 58 Md. 347. The negligent or willful refusal of a conductor of a horse car to stop it when requested by a passenger, a child six years old, does not, of itself, justify the child in getting off the front platform of the car while in motion. Cram v Railroad Co., 112 Mass. 38. Act Mo. March 3, 1869 (page 207, § 4), relating to street railroads in St. Louis, provides that passengers shall not be permitted to get on or off any car, while in motion, by the front platform, and each car shall be furnished with such adjustable gate or guard as shall effectually prevent it. This act was passed to secure safety to life and limb, and should not be narrowly construed. Hence the fact that a boy passenger gets off the front platform, while the car is in motion, is no defense to an action for injuries thereby sustained, if the car is not furnished with a gate which prevents him from so doing. Muehlhausen v. Railroad Co., 91 Mo. 332, 2 S. W. 315.

§ 159. SAME—PASSENGER INCUMBERED WITH PACKAGES.

It is contributory negligence, as matter of law, for a person to attempt to board a moving street car, where one of his hands and arms is incumbered with his coat and dinner bucket, leaving only one of his hands free, and rendering him unable to hang onto the car.[1] So to step from the platform of a moving street car, with a heavy keg in one's hand, is contributory negligence as matter of law.[2] But it is not per se negligence for a person with an umbrella in one hand, and a handkerchief in the other, to attempt to board an electric street car while it is in the act of stopping, and before it has come to a full stop. Such attempt may or may not be negligence, according to the circumstances.[3]

§ 160. PASSENGERS ON VESSELS.

The duty a ferry company owes to passengers, going on and off its boats, is simply to conduct its business with such care and skill as will make the entrance upon its boat safe for persons of ordinary prudence; and if a passenger is injured because of failure to exercise such

§ 159. [1] Reddington v. Traction Co., 132 Pa. 154, 19 Atl. 28.

[2] Ricketts v. Railroad Co., 85 Ala. 600, 5 South. 353. A man 45 years old, and weighing 200 pounds, who attempts to board a street car moving 6 miles per hour, or more, with a bottle in his right hand and a basket on his left arm, is guilty of contributory negligence, as matter of law. Baltimore Traction Co. v. State, 78 Md. 409, 28 Atl. 397.

[3] White v. Railroad Co., 92 Ga. 494, 17 S. E. 672.

prudence, the company is not liable.[1] Thus one who, in passing from a ferryboat to a dock, puts himself in so dense a crowd that he cannot see his footing, and in that situation gets his foot crowded between the boat and the dock, is guilty of contributory negligence, as matter of law.[2] So a passenger has no right to presume that a ferryboat has arrived at its dock because

§ 160. [1] Race v. Ferry Co., 138 N. Y. 644, 34 N. E. 280, reversing (City Ct. Brook.) 19 N. Y. Supp. 675. See, also, ante, § 65.

[2] Dwyer v. Railway Co., 47 N. J. Law, 9. In this case Beasley, C. J., said: "The point of junction of the ferryboat and its dock must, of necessity, be a point of danger. It is idle to liken the transit over such a place to the passing along an ordinary thoroughfare, for, under ordinary conditions, the latter is a place of safety, while the former must, of necessity, be liable to be perilous, for its safeness is altogether dependent on the exercise of incessant caution on the part of human agents, which, while man remains the imperfect creature that he is, cannot be entirely trustworthy. I can, looking at the reason of things, see no difference between the man who, with eyes closed, crosses a railroad track, trusting his safety to the fact that the flagman is at his post, and him who, waiving the use of his eyes, attempts to pass from one of those boats, concluding that all is right because the gates have been opened. A man's eyes are the sentinels that usually warn him of the approach of danger, and, if he chooses to abandon them, it is the general rule of law that he does so at his own cost." This case limits or overrules New Jersey R. Co. v. Palmer, 33 N. J. Law, 90, which held that where a ferryboat has arrived at its dock in the evening, a passenger carried along with the crowd, whose foot is crowded between the boat and the dock on alighting, is not chargeable with contributory negligence, as matter of law, because at the very instant of stepping onto the dock he did not examine particularly to see whether there was a vacant space between the boat and the dock. In Fogassi v. Railroad Co., 19 Misc. Rep. 108, 43 N. Y. Supp. 268, reversing 18 Misc. Rep. 735, 41 N. Y. Supp. 1115, following 13 Misc. Rep. 102, 34 N. Y. Supp. 116, it was held that a passenger on a ferryboat is chargeable with contributory negligence where her fall into a space about two feet wide between the boat and the dock would not have occurred if she had looked

the chain guard and barriers across the bow of the boat are down, when warned and presumably notified by those in charge that a landing has not been made.[3]

Where a steamboat company has provided a safe and convenient landing place for passengers, a passenger who uses the freight landing place, after being warned not to do so, is guilty of contributory negligence.[4] And where a ferryboat has two gangways by which passengers can leave, a passenger cannot recover for injuries sustained while attempting to leave by the gangway intended for teams.[5] So it is negligence,

where she was walking, or had followed the other passengers leaving the boat.

[3] Davis v. Railroad Co., 8 Or. 172. But an adult passenger is not chargeable with contributory negligence in attempting to leave a ferry before the guard chains are down, where it appears that a rule of the company forbidding passengers to do so was permitted by it and its employés to be habitually violated. The Manhasset, 19 Fed. 430.

[4] Dodge v. Steamboat Co., 148 Mass. 207, 19 N. E. 373. "A passenger is bound to obey all reasonable rules and orders of the carrier in reference to the business. The carrier may assume that he will obey, and the carrier owes him no duty to provide for his safety when acting in disobedience. His neglect of his duty in disobeying, in the absence of a good reason for it, will prevent his recovery for an injury growing out of it."

[5] Graham v. Railroad Co., 39 Fed. 596. But a passenger leaving a ferryboat is not guilty of contributory negligence, as matter of law, in leaving the boat by the vehicle way, instead of the passenger way, on invitation of the ferry employés, so as to be precluded from recovering for injuries sustained by being run over by a runaway horse owned by the ferry company, which bolted into the vehicle way. Watson v. Railroad Co., 55 N. J. Law, 125, 26 Atl. 136. In this case it was said: "The use for which the way he took was designed was the transfer of controlled vehicles to and from the boat. Passage over it brought to him knowledge of its customary

as matter of law, for a passenger to jump from the boat to the wharf as the boat is approaching or leaving it.[6] But a passenger on a ferryboat is not, as matter of law, guilty of contributory negligence in taking a position,

use, and suggested a prudent watchfulness against the danger attendant on that use; in other words, it was a place of obvious danger from a certain use, against which it was plaintiff's duty to guard, and the invitation to pass that way did not absolve him from the reasonable performance of his duty in this respect. But the duty did not extend to causes ab extra that use, such as the rapid, uncontrolled career of a wild horse, whose course was undirected, irregular, and regardless of any way, and who, as he rapidly ran at random, happened to spring over the end of the bow to the place where plaintiff was injured. We think it was not the plaintiff's duty to anticipate the use of the driveway by a runaway horse of the defendant, and, speaking with more particularity, to anticipate the bolting of such horse over the end of the bow into the driveway." A passenger who, in broad daylight, ascends a narrow gangway to a vessel in a careless and awkward manner, walking abreast of his wife, and who stumbles and loses his balance, is guilty of contributory negligence. The Anglo Norman, 4 Sawy. 185, Fed. Cas. No. 393.

[6] Keokuk Packet Co. v. Henry, 50 Ill. 264; Fish v. Ferry Co., 4 Phila. 103. But a passenger on a steamer, who is informed by the officers in charge that the boat will not stop at his destination, but will be slowed down at the wharf, so that he can jump ashore, is not guilty of contributory negligence in making the attempt. Cameron v. Milloy, 14 U. C. C. P. 340. A passenger on a steamboat, well acquainted with that mode of travel, and of the jar generally incident to contact with the wharf in effecting a landing, who attempts to go to the upper deck by means of a stairway unprotected by a railing, as the steamer is approaching a wharf, assumes the risk of being thrown from the stairway by such a jar, though she was in charge of one of the boat's employés, who undertook by that means to land her on the wharf, in advance of other passengers. De Graf v. Navigation Co., 10 Wash. 468, 38 Pac. 1006. The soundness of this decision is questionable. In New York it has been held that the fact that a passenger stands at the head of a stairway on a ferryboat as it is entering its slip is not contributory negligence, as matter of law,

as the boat approaches the landing place, in the passageway leading from the cabin to the gate, where it appears that such passageway, though not provided with seats, is often occupied by passengers, without objection, during the journey.[7] So the failure of a passenger on a ferryboat to keep his seat until it is moored to the dock is not contributory negligence, as matter of law, which will defeat a recovery for injuries sustained by being thrown by an unusual shock as the boat struck the dock.[8]

§ 161. BOARDING PASSENGER ELEVATOR.

An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger, to be approached with great caution; but, on the contrary, it may be assumed, when the door

which will preclude a recovery for his being thrown down the stairs by an unusually violent concussion of the ferryboat with the slip. Bartlett v. Transportation Co., 57 N. Y. Super. Ct. 348, 8 N. Y. Supp. 369, affirmed 130 N. Y. 659, 29 N. E. 1033. Nor is it contributory negligence, as matter of law, for a passenger to descend the stairway without taking hold of the railings as the boat is entering the slip. Id. So the fact that a passenger on a ferryboat stands in front of the guard chains as the boat approaches its landing is not contributory negligence, as matter of law, and does not necessarily bar a recovery for injuries sustained by reason of the concussion of the boat with the wharf. Gannon v. Ferry Co., 29 Hun, 631. So a passenger on a steamboat is not, as matter of law, guilty of contributory negligence in leaning against the gangway, which has been negligently left unfastened, by reason of which he falls overboard, and is drowned. McAdam v. Ross, 22 Nova Scotia, 264.

[7] Peverly v. City of Boston, 136 Mass. 366.

[8] Snelling v. Ferry Co., 59 Hun, 619, 13 N. Y. Supp. 388, affirmed 128 N. Y. 579, 28 N. E. 250; Camden & P. S. Ferry Co. v. Monaghan (Pa.) 10 Wkly. Notes Cas. 46.

is thrown open by an attendant, to be a place which may be safely entered, without stopping to look, listen, or make a special examination, though the shaft is not lighted.[1]

§ 162. DURING TRANSPORTATION.

The rule that a person approaching a railroad crossing on a highway must stop, look, and listen has no application to a passenger on a street car; and he is under no obligation to look out and listen, and to jump from the car in apprehension of a collision with a train on the crossing. He can reasonably assume that proper care and attention will be given at the crossing, by those in charge of the car, before an attempt will be made to go over it.[1] So a passenger who sees a train approaching a crossing on an intersecting road is not guilty of contributory negligence because he fails to pull the bell rope, and warn the engineer of the danger. As a passenger, it is no part of his province to interfere in any manner with the management of the train.[2] Neither does knowledge by a passenger on a street car that a portion of the track is undergoing repair charge him with contributory negligence in riding over that portion. He has a right to assume, in the absence of any stipulation or warning to the contrary, that all the necessary precautions have been taken for his safe

§ 161. [1] Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, affirming 53 N. Y. Super. Ct. 446.

§ 162. [1] O'Toole v. Railroad Co., 158 Pa. St. 99, 27 Atl. 737; McCallum v. Railroad Co., 38 Hun, 569.

[2] Grand Rapids & I. R. Co. v. Ellison, 117 Ind. 234, 20 N. E. 135.

transportation, whatever the condition of the track may in fact be.[3]

A passenger on a sleeping car, who, while groping in the dark for the water-closet, opens the door in the vestibule between the two cars, and falls out, is not negligent, as matter of law, in not calling the porter, and waiting for a light.[4] So the failure of an inexperienced and timid female passenger to call attention to the cold condition of the car on a journey made in extremely cold weather is not negligence, as matter of law, which will preclude recovery for a disease caused by the cold; but the effect of such failure, as bearing on the question of contributory negligence, should be left to the jury, to be determined from all the evidence in the case.[5] Where a freight train breaks during the night, leaving the caboose behind, a passenger is not guilty of contributory negligence, as matter of law, in lying down in the caboose, pursuant to the directions of the train hands, who expect the balance of the train to be slowly backed as soon as the break is discovered; and the passenger may recover for injuries sustained in a collision with another section of the train, which also broke loose, and ran backward on a down grade into the caboose.[6]

[3] Citizens' St. Ry. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55.

[4] Piper v. Railroad Co., 89 Hun, 75, 34 N. Y. Supp. 1072; Id., 76 Hun, 44, 27 N. Y. Supp. 593; Id., 78 Hun, 614, 28 N. Y. Supp. 1114.

[5] Hastings v. Railroad Co., 53 Fed. 224.

[6] Delaware, L. & W. R. Co. v. Ashley, 14 C. C. A. 368, 67 Fed. 209. Owing to the breakdown of the engine of a passenger train, the engineer stopped it for repairs between stations in the nighttime. Most of the passengers got off the train. Hearing a freight train approaching from behind, the engineer started the passenger train.

§ 163. PLACING HAND IN DOOR JAMB.

The act of a passenger in placing his hand, during transportation, in such a position upon the jamb of a door that it will certainly be injured by any one closing the door, is contributory negligence. The door, though securely fastened, is capable of being suddenly closed, and is likely to be closed by either passengers or employés of the company.[1] But a passenger on an ele-

Held, that a passenger, seeing his train about to start, and having no knowledge of the impending collision, was not negligent, as matter of law, in getting on the train, though he would have escaped the collision if he had remained on the ground. Gulf, C. & S. F. R. Co. v. Downman (Tex. Civ. App.) 28 S. W. 922. A passenger on a street car, in obedience to a request of a conductor, got off the car to assist in getting it around an obstruction on the track. While so engaged, he was injured by another car, which jumped a parallel track, and struck him. Held, that plaintiff's presence in the street was lawful, and, having no warning of the danger, he is not chargeable with contributory negligence. Stastney v. Railroad Co., 61 N. Y. Super. Ct. 104, 18 N. Y. Supp. 800, affirmed in 138 N. Y. 609, 33 N. E. 1082. The progress of a passenger train was interrupted by wreck of a freight, consisting principally of oil cars, the oil in which was burning. The passengers were conducted around the wreck, 200 feet from the tanks, to await another train. Held, that one of the passengers, who, from motives of curiosity, approached to within 80 feet of the wreck, where he was injured by an explosion of the burning oil, was guilty of contributory negligence, as matter of law. Plaintiff left a safe place provided by the company, and took an exposed position, not intended or pointed out for passengers, and he cannot hold defendant liable for injuries to which such act contributed. Conroy v. Railway Co. (Wis.) 70 N. W. 486.

§ 163. [1] Texas & P. Ry. Co. v. Overall, 82 Tex. 247, 18 S. W. 142. A passenger is guilty of contributory negligence in leaving his hand in the door jamb for about half a minute after getting into the carriage, and cannot recover for injuries sustained by the shutting of the door by the porter, who warned passengers to take their seats, and who did

vated train, who opens the door of the car while the train is standing, and takes a position in the doorway, is not chargeable with contributory negligence, as matter of law, in failing to shove the door back over the catch, and is not thereby precluded from recovering for injuries sustained by the door swinging to upon her hand, caused by the sudden starting of the train before she had an opportunity to alight.[2] So a passenger who, with a parcel in his right hand, attempts to get into a railroad carriage by placing his left hand on the back of the door, is guilty of a want of caution; but whether it is negligence which will prevent a recovery for injuries sustained by his hand being jammed against the door post is a question for the jury, where it further appears that it was dark, and it is left in doubt whether there was any handle which he could have grasped to assist him in getting on the car.[3]

not see plaintiff's hand. Richardson v. Railway Co., 37 Law J. C. P. 300. See, also, ante, § 87, as to slamming of car door.

[2] Baker v. Railroad Co., 118 N. Y. 533, 23 N. E. 885, affirming 54 N. Y. Super. Ct. 394. It is not negligence, as matter of law, for a passenger on an elevated railroad to arise in her seat as the car is approaching her station, and to go to the door of the car, which is held open by one of the trainmen; and where she grasps hold of the door frame, to keep herself from falling by reason of a sudden jar of the car, she may recover for injuries sustained by reason of the trainman's act in negligently permitting the door to slam on her hand. Colwell v. Railway Co., 10 N. Y. Supp. 636, 57 Hun, 452.

[3] Fordham v. Railway Co., L. R. 3 C. P. 368, L. R. 4 C. P. 619.

§ 164. PROJECTING LIMB OR HEAD OUTSIDE OF CAR.

The weight of authority and of reason is in favor of the proposition that it is negligence per se, to be so declared by the court as matter of law, for a passenger on a steam railroad to voluntarily or inattentively protrude his arm, hand, elbow, or head through the window of a car while in motion, and beyond the outer edge of the window, or outer surface of the car; and a recovery cannot be had for any injury which, but for such negligence, could not have been sustained.[1] "Windows are not provided in cars that passengers may project themselves through or out of them, but for the admission of light and air. They are not intended for occupation, but for use and enjoyment without oc-

§ 164. [1] Georgia Pac. Ry. Co. v. Underwood, 90 Ala. 49, 8 South. 116; Indianapolis & C. R. Co. v. Rutherford, 29 Ind. 82; Favre v. Railroad Co., 91 Ky. 541, 16 S. W. 370; Louisville & N. R. Co. v. Sickings, 5 Bush (Ky.) 1; Morel v. Insurance Co., 4 Bush (Ky.) 535; Pittsburg & C. R. Co. v. Andrews, 39 Md. 329; Todd v. Old Colony R. Co., 3 Allen (Mass.) 18, 7 Allen (Mass.) 207; Pittsburg & C. R. Co. v. McClurg, 56 Pa. St. 294, disapproving New Jersey R. Co. v. Kennard, 21 Pa. St. 203, and overruling Laing v. Colder, 8 Pa. St. 479; Richmond & D. R. Co. v. Scott, 88 Va. 958, 14 S. E. 763; Dun v. Railroad Co., 78 Va. 645. A passenger who inadvertently and voluntarily protrudes his arm out of an open window, though not more than two inches beyond the exterior surface of the car, while the train is going through a tunnel, is guilty of contributory negligence, as matter of law. "We cannot furnish any rule by which to measure the distance a passenger may protrude his arm before it can be said that he is guilty of negligence. It is the fact that he does so, without any qualifying circumstances impelling him, not the distance so protruded, that constitutes negligence." Clark's Adm'x v. Railroad Co. (Ky.) 39 S. W. 840.

cupation. No possible necessity of the passenger can be subserved by the protrusion of his person through them. Neither his convenience nor comfort requires that he should do so. It may be—doubtless is—true, that men of ordinary prudence and care habitually lean upon, or rest their arms upon, the sills or windows by which they ride. But this is a very different thing from protrusion beyond the outer edge of the sills, and beyond the surface of the car." [2] In Kentucky the courts have even gone so far as to hold that there can be no recovery for the death of a passenger who, while the train is going through a tunnel, protrudes his head from the car window to vomit, unless the train hands knew of his illness or his perilous position, or could have known of it by the exercise of reasonable care, and then failed to take proper precautions for his safety.[3] In an early Wisconsin case, however, it was held that whether or not a passenger is guilty of contributory negligence in permitting his arm to protrude beyond the external surface of the car is a question of fact for the jury, and not of law for the court.[4] The

2 Georgia Pac. Ry. Co. v. Underwood, 90 Ala. 49, 8 South. 116.

3 Shelton's Adm'r v. Railroad Co. (Ky.) 39 S. W. 842.

4 Spencer v. Railroad Co., 17 Wis. 487. "It is probably the habit of every person while riding in the cars to rest the arm upon the base of the window. If the window is open, it is liable to extend slightly outside. This we suppose is a common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so, to accommodate the motion of the train. Passengers know this, and regulate their conduct accordingly. They do not suppose that the agents and managers of the road smear obstacles to be so placed as barely to miss the car while passing. And it seems to us almost absurd to hold that in every case, and under all circumstances, if the

same ruling has been made in South Carolina,[5] in Texas,[6] and in Australia.[7] In Illinois, also, under the now exploded doctrine of comparative negligence, it has been held that the negligence of a passenger in permitting his arm to rest on the base of a car window, and to slightly project outside, is slight, when compared with the negligence of the railroad company in permitting freight cars to stand on a parallel track, within a few inches of the passing passenger train; and hence the passenger may recover for the breaking of his arm by coming in contact with the freight train.[8]

Of course, a passenger who rests his elbow on the sill of an open window, without projecting it beyond the car, and whose arm is thrown outside of the car by the force of a collision, and is injured, does not contribute to the cause of the injury by his own negligence.[9] So where there is evidence that it is necessary for a mail

party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in ordinary care and prudence." Id.

[5] Quinn v. Railroad Co., 29 S. C. 381, 7 S. E. 619.

[6] Gulf, C. & S. F. Ry. Co. v. Daushauk, 6 Tex. Civ. App. 385, 25 S. W. 295. See ante, § 28, as to the province of court and jury in Texas and South Carolina.

[7] Rex v. Victorian Ry. Com'rs, 18 Vict. Law R. 250, where the American cases are criticised, and the court said: "Our Victorian first-class carriages are generally so constructed that passengers can put their heads or lean their bodies out of the window, or sit with their elbows protruding, and there is nothing about them to indicate that those who do so will incur any danger."

[8] Chicago & A. R. Co. v. Pondrom, 51 Ill. 333. See post, § 192, as to the doctrine of comparative negligence.

[9] Farlow v. Kelly, 108 U. S. 288, 2 Sup. Ct. 555; Curtis v. Railway, 6 McLean, 401, Fed. Cas. No. 3,501; Schneider v. Railroad, 54 Fed. 466, 8 C. C. A. 571, 60 Fed. 210; Carrico v. Railroad Co., 35 W. Va. 389, 14 S. E. 12; Winters v. Railroad Co., 39 Mo. 467.

agent to put his head out of the window of his car on approaching the various stations, and it is shown that this is generally done, the question whether a mail agent is guilty of negligence in so doing is for the jury.[10]

A distinction is made in this respect by some of the courts between street cars and the ordinary steam-railway carriages. It has been held in some cases not to be negligence, as matter of law, for a passenger to project his hand or his arm a few inches beyond the external surface of a street car.[11] In Louisiana, in a case arising in New Orleans, it is said: "The evidence, as well as common observation, establishes that it is customary practice for persons riding in street cars of this city, when not crowded, to sit with an arm resting on the window, and projecting more or less outside of the car. This practice is suggested, if not invited, by the construction of the windows, which are of a height that renders such a position easy and comfortable, and also by the natural inclination to face the direction in which one travels, to look out at passing objects, and, in a climate like ours, to turn the face so as to catch the breeze." [12] In Pennsylvania, however, it

[10] Houston & T. C. Ry. Co. v. Hampton, 64 Tex. 427. The fact that a passenger's elbow projects slightly out of an open window does not, as matter of law, preclude a recovery for injuries to his hand and wrist, which were inside, and which were struck by a stick of cordwood falling through the open window from a pile near the track. The projection of the elbow is not the proximate cause of the accident. Moakler v. Railway Co., 18 Or. 189, 22 Pac. 948.

[11] Miller v. Railroad Co., 5 Mo. App. 471; Summers v. Railroad Co., 34 La. Ann. 139.

[12] Summers v. Railroad Co., 34 La. Ann. 139. But a passenger on

is negligence, as matter of law, for a passenger on a street car to protrude any portion of his arm out of the car window, whether he does it consciously or unconsciously.[13] But if his arm is on the window sill, wholly within the car, and is thrown out by a jolt, then the question of his contributory negligence is for the jury.[14] And where a passenger in a street car, while taking his seat, rests his hand on and partially over the base of an open window, and it is immediately struck by an obstruction within an inch of the car, the question of contributory negligence is for the jury.[15] So where a street car runs off the track, and is driven over cobble stones for a distance of two squares, it is not negligence for a passenger to grasp the window post

a street car is guilty of negligence in putting his head out of the window in the nighttime, to ascertain the color of the car, and identify it, and cannot recover from an electric light company which has put a pole so near the track that his head came in contact therewith. Moore v. Illuminating Co., 43 La. Ann. 792, 9 South. 433.

[13] People's P. Ry. Co. v. Lauderbach, 4 Penny. (Pa.) 406. If a passenger on a street car projects his arm from the window, and that arm is injured, or injury results from that projection, he cannot recover. Goorin v. Traction Co. (Pa. Sup.) 36 Atl. 207.

[14] Germantown P. Ry. Co. v. Brophy, 105 Pa. St. 38.

[15] Dahlberg v. Railway Co., 32 Minn. 404, 21 N. W. 545. Whether a passenger on an open electric car, who, leaving his seat, goes to the platform, where the conductor is standing, and, for the purpose of observing a fire, projects his head beyond the side of the car, so that he is struck by a tree, is guilty of contributory negligence, is a question for the jury. Sias v. Railway Co., 92 Hun, 140, 36 N. Y. Supp. 378. A passenger on a street car is not, as matter of law, guilty of contributory negligence in standing on the rear platform, with his hand on the railing, and may recover against the owner of a dray for injuries sustained by his hand being struck by the dray. Seigel v. Eisen, 41 Cal. 109.

in such a manner that the back of his hand protrudes from the car.[16] But a passenger on an open street car, who, while the car is in rapid motion, places one of his feet on the running board, and permits a portion of his body to extend beyond the exterior surface of the car, is guilty of contributory negligence, as matter of law, which precludes recovery for his death caused by his head striking against one of the poles planted in close proximity to the track.[17] In Massachusetts it has been held that a passenger who stands on the lowest step of a street car moving four miles an hour, with one hand on the dasher rail and the other on the body rail, facing towards the street, and who intentionally leans out beyond the car to look in the direction from which it came, is guilty of contributory negligence, as matter of law, and cannot recover for injuries sustained by striking his head against a post standing within three feet of the track, and visible from the car a quarter of a mile; but a momentary or casual leaning out, such as would be incident to an effort to secure a safe or more comfortable position, is not negligence, as matter of law.[18]

The rule that it is negligence per se for a passenger to protrude any portion of his body outside of the windows of a car does not apply to a passenger on a stagecoach. Railway coaches pass along an undeviating track, and often within a few inches of signal posts, switch bars, cattle guards, bridge timbers, and

[16] North Baltimore Pass. Ry. Co. v. Kaskell, 78 Md. 517, 28 Atl. 410.

[17] State v. Railway Co. (Md.) 34 Atl. 1130; Gilly v. Railroad Co. (La.) 21 South. 850.

[18] Cummings v. Railway (Mass.) 41 N. E. 126.

cars upon side tracks, rendering it dangerous for passengers to expose any portion of the body beyond the outer line of the coaches, which themselves project beyond the wheels and the truck. But stagecoaches do not, in this particular, differ from other road vehicles, the wheels of which project laterally beyond the body of the vehicle, which circumstance, in connection with the different character of the roadway and mode of transportation, is an immunity against danger from the mere projection of an arm outside the window, or beyond the line of the body of the vehicle.[19]

§ 165. STANDING, OR OCCUPYING DANGEROUS SEAT, IN CAR.

A passenger is not, as matter of law, guilty of contributory negligence in arising in his seat as the train is approaching his station, for the purpose of hastening his departure from the car, but the question is one of fact for the jury.[1] The fact that he stands near the open car door does not alter this rule.[2] Neither

[19] Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632.

§ 165. [1] Barden v. Railroad, 121 Mass. 426; Wylde v. Railroad Co., 53 N. Y. 156; Newton v. Railroad Co., 80 Hun, 491, 30 N. Y. Supp. 488; Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204. A passenger on a train so crowded that the passageways, platforms, and even the roof were occupied, was promised by the conductor that the train would be stopped at a flag station, to enable him to get off. Held, that it could not be said, as matter of law, that the passenger was careless, because, as the train approached the flag station, where the stop would ordinarily be very short, he rose from his seat, endeavored to make his way to the door, and, having reached

[2] Worthen v. Railway Co., 125 Mass. 99; Condy v. Railway Co., 13 Mo. App. 587, 588.

is a passenger guilty of contributory negligence, as matter of law, in arising from his seat, during the journey, to pick up a bundle which has fallen to the floor,[3] nor to stand near a stove, for the purpose of warming himself.[4] A passenger who, before he had seated himself in a car, was injured by the negligence of defendant in causing another car to come into violent contact with the former, is not precluded from recovering merely because he did not occupy the first vacant seat he came to, nor because he incumbered himself with bundles, or with the care of children, which impeded his movements.[5]

Discomforts and dangers are more incident to travel on freight than on passenger trains, and a passenger on the former is called on to exercise a higher degree of care than the latter.[6] The fact that a passenger in a caboose is standing, when there are some vacant

the platform, there fell, or was pushed out by the surging crowd which occupied it. Treat v. Railroad Corp., 131 Mass. 371.

[3] Coudy v. Railway Co., 85 Mo. 79.

[4] Northern Pac. R. Co. v. Hess, 2 Wash. St. 383, 26 Pac. 866. A passenger has the right, while on his journey, to go from his seat to the water-closet of the car in which he is riding, and may recover for injuries sustained by being thrown out of an open door by a violent jerk of the train. Lavis v. Railroad Co., 54 Ill. App. 636.

[5] Tillett v. Railroad Co., 118 N. C. 1031, 24 S. E. 111.

[6] Harris v. Railroad Co., 89 Mo. 233, 1 S. W. 325; Felton v. Horner, 97 Tenn. 579, 37 S. W. 696. A passenger on a freight train, who, by the exercise of ordinary care, may know that the train has stopped to do switching, and that a part of the train is likely to be backed against the part to which the caboose is attached, is guilty of contributory negligence in leaving his seat, and standing up in the car, without thinking of these things. Harris v. Railroad Co., 89 Mo. 233, 1 S. W. 325.

seats, is some evidence of contributory negligence, which ought to be submitted to the jury, in an action for injuries sustained in being thrown down by the sudden starting of the train.[7] But a passenger is not guilty of negligence, as matter of law, in arising from his seat in the caboose on the sounding of a whistle indicating approach to a station.[8] Nor is a passenger on a freight train guilty of contributory negligence, as matter of law, in leaving her seat to get a drink of water, nor does she assume the risk of a sudden and violent jar, caused by the negligent application of the air brakes.[9] A passenger who occupies the arm of a seat in a coach on a freight train when he knows that there are other cars to be coupled,[10] or who sits in the conductor's chair, near the open sliding door of the caboose, when there are vacant seats away from the door for the use of passengers,[11] is guilty of negligence, as matter of law.

[7] Wallace v. Railroad Co., 98 N. C. 494, 4 S. E. 503.

[8] Lusby v. Railroad Co., 41 Fed. 181.

[9] Indiana, I. & I. R. Co. v. Masterson (Ind. App.) 44 N. E. 1004. But a woman 63 years old, and crippled by a former dislocation of her hip, traveling in the caboose of a freight train, is negligent in leaving her seat to get a drink, while the engine is switching cars; and she cannot recover for injuries in a fall caused by the jolt in coupling cars, where it appears that the jolt was not greater than usual in such cases, and that she was aware that such jolts necessarily followed coupling of cars. Felton v. Horner, 97 Tenn. 579, 37 S. W. 696.

[10] Smith v. Railroad Co., 99 N. C. 241, 5 S. E. 896.

[11] Norfolk & W. R. Co. v. Ferguson, 79 Va. 241. Though there are stationary seats in a caboose, yet a passenger is not guilty of contributory negligence, as matter of law, in sitting on a movable chair, so as to preclude recovery for injuries sustained in being thrown from the chair by a concussion with cars, which were violently

With respect to street cars, the rule seems to be even less stringent than in respect to ordinary railway cars. A passenger is not guilty of negligence, as matter of law, in moving about the floor of a horse car while in motion; but it is a question of fact for the jury whether, under all the circumstances existing at the time, it shows a want of reasonable care.[12] So a person who enters an open street car, the seats of which are all occupied, is not guilty of negligence, as matter of law, in standing between two seats, holding onto the seat in front.[13] Where the only passenger on a street car,

backed against the caboose. Quackenbush v. Railway Co., 73 Iowa, 458, 35 N. W. 523. A passenger on an excursion train, who seats himself on the rear end of the box of an open car, not exceeding two and one-half inches in thickness, with his feet elevated by being placed in the seat directly in front of him, and with no possible opportunity of protecting himself in case of a sudden jolt of the car, when he might have found a safe seat in an adjoining car, or stood up in the one in question, is guilty of contributory negligence, as matter of law; and, in an action for his death, caused by falling from his seat while the train was in motion, it is error to submit the question of contributory negligence to the jury. Jackson v. Crl'y, 16 Colo. 103, 26 Pac. 331.

12 Baltimore & Y. T. Road v. Leonhardt, 66 Md. 70, 5 Atl. 346.

13 Lapointe v. Railroad Co., 144 Mass. 18, 10 N. E. 497. Nor is standing in the aisle. Griffin v. Railroad Co., 63 Hun, 626, 17 N. Y. Supp. 692. Owing to a snowstorm, a street-car company used coaches on runners, kept for that purpose. A woman hailed one of these coaches, the driver stopped, and, owing to the crowded condition of the car, she was thrown out by the sudden jerk in starting. The court said: "If the female plaintiff, when she stopped the defendant's omnibus, and undertook to take a place in it as a passenger, saw, or had an opportunity to see, that there was absolutely no room for her, and no place in which she could even stand with reasonable security, it might well be said to be a want of due care to enter and attempt to ride in that way. But the defendant, on the other hand,

a girl 18 years old, is taken suddenly ill, and the conductor refuses her request to stop the car, so that she can get off, it is for the jury to determine whether she is guilty of negligence in getting up and staggering towards the car door, through which she fell.[14] But one who enters an elevated railroad car at a station, and looks leisurely around without taking a seat, and who is thrown down by the inevitable jerk of the train in starting, is guilty of contributory negligence, as matter of law.[15]

§ 166. PASSING FROM CAR TO CAR ON MOVING TRAIN.

As passenger coaches are constructed nowadays, it is not, as matter of law, negligence for a passenger to go from one car to another while the train is in motion. In a modern vestibuled train, there is no more danger in such an attempt than in walking about in the car.[1]

by the act of stopping the carriage at her signal, and opening the door for her to enter, must be considered, not merely as giving her an opportunity to judge whether it would be safe and convenient for her to take passage, but as inviting her to do so, and assuring her that her passage should be a safe one, at least, so far as depended upon the exercise of reasonable and ordinary care, diligence, and skill on their part in driving and managing their horses." It was therefore held that the question of plaintiff's contributory negligence was for the jury. Geddes v. Railroad Co., 103 Mass. 391.

14 McCann v. Railway Co. (N. J. Err. & App.) 34 Atl. 1052.

15 De Soucey v. Railway Co. (Com. Pl.) 15 N. Y. Supp. 108.

§ 166. 1 A passenger on a vestibuled train left the car door open on going into another car during the night to see the conductor. On his return, the outside door of the vestibule was open, but the car door had been closed. Misled by the dim light reflected from the sleeping car through the open door, he mistook it for the door leading into the

Even where the train is not vestibuled, it has been held not to be negligence per se for a passenger to go from the smoking car to his seat in another car,[2] or to go from one car to another, in search of a seat,[3] or in obedience to the directions of the conductor.[4] But where the car platforms are old fashioned, and the cars are one moment close together, and the next two or three feet apart, a different question is presented. With the train thus pitching and tossing while in motion, an inexperienced passenger is guilty of negli-

car, and by a lurch of the train he was thrown through the door from the train. Held, that he was not guilty of contributory negligence, as matter of law, but that the question was one of fact for the jury. Bronson v. Oakes, 22 C. C. A. 520, 76 Fed. 734.

[2] Costikyan v. Railroad Co., 58 Hun, 590, 12 N. Y. Supp. 683, affirmed 128 N. Y. 633, 29 N. E. 147.

[3] Louisville & N. R. Co. v. Berg's Adm'r (Ky.) 32 S. W. 616; Chesapeake & O. R. Co. v. Clowes (Va.) 24 S. E. 833. Whether or not a passenger is guilty of negligence in passing from one car to another to get a drink of water, while the train is moving slowly, is a question for the jury, and the court erred in granting a nonsuit. Cotchett v. Railway Co., 84 Ga. 687, 11 S. E. 553. A passenger on an excursion train was allowed by the conductor to leave one car, and go into another to sell tickets. He had left his wife in one car, which was an open one, the seats being reached from an outside running board, instead of an aisle. The running board was used by the conductor and trainmen in passing from one portion of the train to another. Held, that it was not negligence, as matter of law, for the passenger to suppose that he also could use it safely, and to try to do so in returning to his wife. And supposing it to be safe, as it should be, it was not negligence to omit to look out for structures so close to the track as to endanger persons on the running board. Dickinson v. Railway Co., 53 Mich. 43, 18 N. W. 553.

[4] McIntyre v. Railroad Co. (1867) 37 N. Y. 287; Louisville & N. R. Co. v. Kelly, 92 Ind. 371; Davis v. Railway Co., 69 Miss. 136, 10 South. 450.

gence in attempting to pass, of his own motion, from one car to another.[5] Of course, in going from one car to another of a rapidly moving train, merely for his own convenience, the passenger takes the risk of all accident not arising from any negligence of the carrier. A passenger who collides with a fellow passenger while crossing the platforms between the cars, and who is thrown from the car by the force of the collision and an ordinary lurch of the train, cannot recover from the company, since it has been guilty of no negligence.[6] But a passenger going from car to car in search of a seat does not assume the risk of a collision with a locomotive engine or another train.[7] It has, however, been held that to pass from one car to another in the nighttime, while the train is under full headway, is negligence, as matter of law.[8] So a passenger who

[5] Cleveland, C., C. & I. R. Co. v. Manson, 30 Ohio St. 451.

[6] Stewart v. Railroad Co., 146 Mass. 605, 16 N. E. 466. So the passenger assumes the risk of all ordinary jerks of the train incident to stopping the train at a station which it is approaching. Choate v. Railway Co. (Tex. Sup.) 36 S. W. 247, affirming (Tex. Civ. App.) 35 S. W. 180; Sickles v. Railway Co. (Tex. Civ. App.) 35 S. W. 493.

[7] Dewire v. Railroad Co., 148 Mass. 343, 19 N. E. 523.

[8] Sawtelle v. Insurance Co., 15 Blatchf. 216, Fed. Cas. No. 12,392. "The din and clamor of the train, the rushing of the wind, and dust and smoke, the consciousness that a misstep or miscalculation of distances may be fatal, tend to confuse or excite the faculties, and disturb the judgment; and, although it is a common practice thus to pass from car to car, it is rarely accomplished without experiencing a sense of relief when it has been safely done. When darkness adds another condition of uncertainty to the attempt, there can be no justification of the act in the mind of any prudent man." Id. In Louisiana, where the supreme court passes on the facts as a jury, it has been held that stepping from one car to another without inducement or invitation, or on a necessary errand, while the train is in

has gone from the coach to the engine to get a drink of water is guilty of contributory negligence, as matter of law, in attempting to return to the coach while the train is on a sharp curve, going at a rapid rate of speed.[9]

It is generally hazardous to pass from one street car to another, because of the distance between the car platforms and the manner in which the cars are fastened together. Thus a passenger who leaves his seat in an open car, and goes onto the running board, to pass into another car, is guilty of contributory negligence, as matter of law, if there was no necessity for leaving his seat, and he cannot recover for injuries sustained in being struck by an iron column near the track; but if he desired to make a change because his seat was so crowded as to be uncomfortable, the question is one of

motion, is negligence. Bemiss v. Railroad Co., 47 La. Ann. 1671, 18 South. 711.

[9] McDaniel v. Railroad Co., 90 Ala. 64, 8 South. 41. If a passenger on a railroad car is guilty of negligence, by unnecessarily exposing himself to danger, by wrestling or scuffling in the cars, or by imprudently or unnecessarily passing from one car to another while the train is in motion, and receives an injury, and his carelessness and imprudence has contributed in any way to produce the injury, he cannot recover for it. Galena & C. M. R. Co. v. Fay, 16 Ill. 558. In an action for the death of a passenger, who was found dead on the track, it is some evidence of negligence that he undertook to pass through the train, moving rapidly, in the nighttime, unless it may be reasonably inferred that he had some excuse for so doing more than mere restlessness or curiosity. State v. Maine Cent. R. Co., 81 Me. 84, 16 Atl. 368. A passenger, taking a train, who passes from one car to another, both stationary, about six inches apart, is guilty of contributory negligence in stepping on the intervening buffers, just as they separate, owing to the starting of the train. Snowden v. Railroad, 151 Mass. 220, 24 N. E. 40.

fact for the jury.[10] So a passenger on a train consisting of an open dummy car and a closed dummy car is guilty of contributory negligence, as matter of law, in attempting to step from the running board of the open car to the steps of the closed car while in motion, where the distance between the two is from two and one-half to three feet, and subject to sudden and material variations by the motion of the train.[11] And a custom of passengers to pass from the running board of the open car to the steps of the closed car does not excuse a passenger in making the attempt, if it is obviously dangerous to do so.[12]

§ 167. RIDING ON PLATFORM.

By the weight of authority, it is negligence, as matter of law, for a passenger to be upon the platform of a rapidly moving train, unless he is compelled to assume such position as the best he could do at the time, acting as a careful and prudent man.[1] "The danger

[10] Coleman v. Railroad Co., 114 N. Y. 609, 21 N. E. 1064, reversing 41 Hun, 380.

[11] Hill v. Railroad Co., 100 Ala. 447, 14 South. 201.

[12] Id. A passenger on a train of electric cars is not guilty of negligence, as matter of law, in passing from one car to another, so as to bar recovery for injuries sustained by a shock of electricity received on touching the iron handles of the platform. Burt v. Railroad Co., 83 Wis. 229, 53 N. W. 447.

§ 167. [1] Worthington v. Railroad Co., 64 Vt. 107, 23 Atl. 590; Hickey v. Railroad Co., 14 Allen (Mass.) 428; Herdman v. Railroad Co., 62 Hun, 621, 17 N. Y. Supp. 198. Though a passenger on a crowded excursion train may not be guilty of negligence in going from car to car in search of a seat while the train is in motion, yet it is negligence for him to remain on the platform for several minutes when there is standing room inside the car, and no necessity exists

of standing on the narrow platform of a passenger car while the train is moving with the usual speed of railroad trains is most conspicuous. No prudent man,—no man ordinarily mindful of his conduct, and of matters about him,—would occupy such a position. The greater the speed of the train, the more imminent the danger in such a place. Thoughtful people instinctively shudder when they see persons take such risks. Curves are necessarily frequent on railroads in Maine,—a fact well known to all, and a fact which makes riding on the platform of a car most perilous. The knowingly incurring such an imminent visible peril—the choosing to ride in such a conspicuously dangerous place—must be held by all reasonable people to be recklessness in a high degree. The danger, the chance of injury, is visibly imminent and great. No man of reason can fail to apprehend it. No prudent man would fail to avoid it. There seems to us no room for debate or question upon this proposition." [2] A regulation forbidding passengers to stand on the platform of a moving car is a reasonable and proper rule, and a passenger who knowingly violates it does so at his own

for him to remain so long on the platform; and he cannot recover for injuries sustained in being jolted from the platform by the ordinary motion of the train. Camden & A. R. Co. v. Hoosey, 99 Pa. St. 492.

[2] Goodwin v. Railroad, 84 Me. 203, 24 Atl. 816. It is immaterial that the day was hot; that the cars were dusty, and uncomfortably crowded; that no trainman showed the passenger a seat, or advised him where he could find a seat; that the conductor took his ticket on the platform, and made no objection to his standing there; and that the passenger did not see the sign on the car door prohibiting such riding.

peril, and not at the peril of the railroad.[3] In some states, however, it is held not to be contributory negligence, as matter of law, for a passenger to ride on the platform of a car on a moving train, but the question is one of fact for the jury.[4]

Unquestionably, it is the duty of a passenger standing on the platform of a steam-railroad car to go inside when requested so to do by a person having charge of the train, if there is standing room inside, although there are no vacant seats. The fact that the passenger has a well-founded ground of complaint against the railroad company for not providing adequate accommodations for passengers does not release him from the duty of leaving the platform.[5]

[3] McCauley v. Railroad Co., 93 Ala. 356, 9 South. 611; Macon & W. R. Co. v. Johnson, 38 Ga. 409.

[4] Bouknight v. Railroad Co., 41 S. C. 415, 19 S. E. 915; Zemp v. Railroad Co., 9 Rich. Law (S. C.) 84; Missouri, K. & T. Ry. Co. v. Brown (Tex. Civ. App.) 39 S. W. 326; Illinois Cent. R. Co. v. O'Keefe, 154 Ill. 508, 59 N. E. 606, reversing 49 Ill. App. 320. In an earlier Illinois case, however, it was held that a passenger who voluntarily stands on the platform of a car in motion, with abundant standing room inside, is guilty of negligence, as matter of law, and there can be no recovery for his death, caused by falling to the ground, not in consequence of a collision, or a broken rail, or other fault of the company, but in the endeavor to secure a bank note that the wind had blown away. Quinn v. Railroad Co., 51 Ill. 495. Riding on the platform of a car will not prevent a recovery, as matter of law, unless it clearly appears that but for such act the accident would not have happened. Woods v. Southern Pac. Co., 9 Utah, 146, 33 Pac. 628. A soldier guarding prisoners of war while being transported on a train, is not chargeable with negligence in standing on the car platform in the performance of his duty, pursuant to orders of his superior officer. Truex v. Railway Co., 4 Lans. (N. Y.) 198.

[5] Graville v. Railroad Co., 105 N. Y. 525, 12 N. E. 51, reversing 13 Daly (N. Y.) 32; Memphis & L. R. Ry. Co. v. Salinger, 46 Ark. 528;

Of course, a passenger is not, as matter of law, guilty of negligence in standing on the platform of cars in motion if there is no room inside.[6] One who boards a crowded passenger car has a right, in the absence of any warning not to do so, to stand and ride upon the platform if there is no room within the car, and is entitled to the same care and consideration as any other passenger.[7] Neither does a passenger on a train owe a duty to the company to push and crowd his way, in order to get an advantage over other passengers in securing a place within the cars; and it does not follow, as matter of law, that he will be guilty of negligence in not so doing. Nor will his duty to the company require that he shall wholly disregard the usual and ordinary courtesies and amenities of life. In fact, it is not necessarily and as matter of law negligence

Fisher v. Railroad Co., 39 W. Va. 366, 19 S. E. 578; s. c. (W. Va.) 24 S. E. 570; Louisville & N. R. Co. v. Bisch, 120 Ind. 549, 22 N. E. 662. A conductor performs his duty when he asks a passenger riding on the car platform to come inside, and, on the passenger's refusal to obey, the conductor is not bound to stop the train, and put him off. Fisher v. Railroad Co. (W. Va.) 24 S. E. 570.

[6] Willis v. Railroad Co., 34 N. Y. 670, affirming 32 Barb. (N. Y.) 398; Werle v. Railroad Co., 98 N. Y. 650; Lafayette & I. R. Co. v. Sims, 27 Ind. 59; Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 627, 31 N. E. 406, 38 Ill. App. 33. It is not contributory negligence, as matter of law, for a passenger to ride on the car platform, if the cars are crowded, and there are no vacant seats inside. Chesapeake & O. R. Co. v. Lang's Adm'r (Ky.) 38 S. W. 503. It is not negligence, as matter of law, for a person having a ticket good only on a certain train to get on the platform of a car, where he did not know, when he came to take the train, that it was so crowded that he could not get inside the car. Chicago & A. R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698, affirming 60 Ill. App. 93.

[7] Lynn v. Pacific Co., 103 Cal. 7, 36 Pac. 1018.

to stand aside and allow ladies to occupy the safest and most desirable positions in a public conveyance.[8] So, though a number of passengers leave a crowded train at an intermediate station, the question whether plaintiff is guilty of contributory negligence in continuing to ride on the platform, instead of searching for a place inside of some other car, is for the jury, where it does not appear that he might have gotten a safer or better position, or that he received any notice from the conductor, or any one else, that he might find room in some other car.[9]

By the weight of authority, it is negligence, as matter of law, for a passenger to leave a car, and stand on the platform, while the train is rapidly moving, in order to be ready to alight when it shall stop at his station, which it is approaching, where his act is in violation of notices posted in the car, and where there is no necessity for him to do so.[10] But where it is cus-

[8] Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406. But a passenger on a vestibuled train, about to enter a car, has been held guilty of negligence in stepping backward, to permit a lady passenger to enter, without looking to see whether there is an opening between the cars into which he steps. Louisville, N. A. & C. Ry. Co. v. Stout, 66 Ill. App. 298.

[9] Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406, 38 Ill. App. 33. A different ruling was made in Chicago & N. W. R. Co. v. Carroll, 5 Ill. App. 201, which held that where a number of passengers on a crowded train leave at an intermediate station, it is the duty of a passenger riding on the platform to ascertain whether there is room inside; and if he fails to do so, and continues riding on the platform, when there is in fact room inside, he cannot recover for injuries sustained in being jolted off the car.

[10] Scheiber v. Railway Co., 61 Minn. 499, 63 N. W. 1034; Paterson v. Railway Co., 85 Ga. 653, 11 S. E. 872; Alabama G. S. R. Co. v.

tomary for a train to merely slow down at a station, instead of coming to a full stop, a passenger is not guilty of negligence in going on the platform as the train is approaching the station.[11] So, a passenger who, at the invitation of a brakeman, takes a position on the car platform, to be in immediate readiness to alight when the train comes to a stop, is not guilty of contributory negligence as matter of law. The platform is not such a position of obvious danger that a reasonable man would not have obeyed the servant, or accepted the invitation.[12]

As a general proposition, a passenger is not guilty of contributory negligence in standing on the platform of a car at rest, and his so standing there will not

Hawk, 72 Ala. 112; Bon v. Assurance Co., 56 Iowa, 664, 10 N. W. 225; Jammison v. Railway Co., 92 Va. 327, 23 S. E. 758; Fletcher v. Commissioner of Railways, 7 New South Wales, 251. The mere announcement of a station by a conductor, and a remark to a passenger, "I wish I was as near home as you are," do not justify a passenger in going on the car platform; and he cannot recover for injuries sustained in being jolted off the platform. Blitch v. Railroad, 76 Ga. 333. A passenger who is asleep when his station is reached is guilty of negligence in leaving the car after it has attained a rapid speed, and in going on the car steps, with the intention of alighting, if the speed should slacken, though he was advised by the brakeman to get off quickly; and he cannot recover for injuries sustained in being thrown from the steps by a jerk of the train. Lindsey v. Railroad Co., 64 Iowa, 407, 20 N. W. 737. But in Schultze v. Railway Co., 32 Mo. App. 438, it was held that, after the whistle has sounded, and the name of a passenger's station has been called, a passenger is not guilty of contributory negligence, as matter of law, in going on the car platform, and in stepping on the car steps as the train is approaching the station platform.

[11] Brashear v. Railroad Co., 47 La. Ann. 735, 17 South. 269.

[12] Baltimore & O. R. Co. v. Meyers, 10 C. C. A. 185, 62 Fed. 367; Kentucky & I. Bridge Co. v. Quinkert, 2 Ind. App. 244, 28 N. E. 338.

defeat the right to recover for injuries sustained in a collision with another car.[13] But a passenger who leaves his seat in a car on a freight train while at a station, and stands on the car platform, without even taking the simple precaution of supporting himself by holding to the railing, or anything else, is guilty of negligence, as matter of law, which will preclude a recovery for injuries sustained in being jerked from the platform by the sudden starting of the train.[14] So a passenger who leaves his seat in an ordinary car, and goes on the platform, knowing that the train is about to start, and who is thrown down by the starting of the engine, with no unusual or unnecessary jerk, is guilty of negligence, and cannot recover from the company for the injuries sustained.[15]

[13] Walter v. Railroad Co., 39 Iowa, 33; Collins v. Railroad Co., 12 Barb. (N. Y.) 492. Where a train has been stopped between stations, to put off tramps, a passenger is not guilty of contributory negligence, as matter of law, in going on the car platform to see what is going on, and is not thereby precluded from recovering for injuries sustained by the accidental discharge of the conductor's pistol as he swung himself on the car after the train had started. Gerstle v. Railway Co., 23 Mo. App. 361. Whether or not it is negligence for a passenger to ride on the platform of a car as the train is leaving the station, and before it has attained full speed, is for the jury. Goodrich v. Railroad Co., 29 Hun, 50.

[14] Malcom v. Railroad Co., 106 N. E. 63, 11 S. E. 187; Smotherman v. Railway Co., 29 Mo. App. 265. A passenger on a freight train, which, on a dark night, stops on a high trestle near its destination, pursuant to a signal, is guilty of negligence, as matter of law, in going on the platform of the caboose car, without making inquiry of the conductor as to whether it is prudent, or as to the length of time the train will stop. Rockford, R. I. & St. L. R. Co. v. Coultas, 67 Ill. 398.

[15] Torrey v. Railroad, 147 Mass. 412, 18 N. E. 213. A mother, who, with a small child, not three years old, takes passage on a mixed pas-

§ 168. SAME—STREET CAR.

It is not contributory negligence, as matter of law, for a passenger to stand on the platform of a crowded street car, but the question is one of fact for the jury.[1] Rules prescribed for the observance of passengers on steam railroads, which run their trains at great speed, are very different from those on street railways. In absence of express rules, every passenger knows that what might be consistent with safety on one would be extremely hazardous on the other.[2] The seats inside the car are not the only places where the managers of the car expect passengers to remain; but it is notorious

senger and freight train, is guilty of negligence in permitting the child to go on the platform of a car while the train is stopping at a station, and the locomotive engaged in switching cars on a side track; and, where the child is thrown from the platform by a jar of no unusual violence, caused by the coupling of freight cars to the train, the mother cannot recover for injuries sustained in thrusting her arm under the wheels to save her child from being run over. De Mahy v. Steamship Co., 45 La. Ann. 1329, 14 South. 61.

§ 168. [1] Meesel v. Railroad Co., 8 Allen (Mass.) 235; Germantown P. Ry. Co. v. Walling, 97 Pa. St. 55. Not negligence, in absence of notice to the contrary. Augusta & S. R. Co. v. Renz, 55 Ga. 126. It is not contributory negligence per se for a passenger to ride on the platform of an electric street-railway car. Marion St. R. Co. v. Shaffer, 9 Ind. App. 486, 36 N. E. 861. It is not negligence per se for a passenger to ride on the platform of a crowded electric car. East Omaha St. R. Co. v. Godola (Neb.) 70 N. W. 491. Where an electric car is too crowded to permit a passenger to enter, he is not, as matter of law, guilty of contributory negligence in standing on the rear platform near the steps, holding to the rail behind him with one hand,—a position the conductor told him to take. Reber v. Traction Co. (Pa. Sup.) 36 Atl. 245.

[2] Germantown P. Ry. Co. v. Walling, 97 Pa. St. 55.

that they stop habitually to receive passengers to stand inside till the car is full, and then to stand upon the platforms till they are full, and continue to stop and receive them even after there is no place for them to stand, except on the steps of the platform.[3] A passenger on an elevated train is not guilty of negligence, as matter of law, in riding on the platform of an elevated car, though when he gets on he knows that the car and platform are crowded.[4]

Even when there is room inside, standing on the rear platform of a moving street car is not, under ordinary circumstances, contributory negligence per se on the part of a passenger, at least in the absence of any published rule of the carrier forbidding it.[5] Neither

[3] Meesel v. Railroad Co., 8 Allen (Mass.) 235.

[4] Graham v. Railway Co., 149 N. Y. 336, 43 N. E. 917, reversing 8 Misc. Rep. 305, 28 N. Y. Supp. 739; Merwin v. Railroad Co., 48 Hun, 608, 1 N. Y. Supp. 267, affirmed, 113 N. Y. 659, 21 N. E. 415; Sutherland v. Insurance Co., 87 Iowa, 505, 54 N. W. 453. Voluntarily riding on the rear platform of a crowded street car is not negligence per se. Metropolitan R. Co. v. Snashall, 3 App. D. C. 420. This case must be taken to overrule Andrews v. Railroad Co., 2 Mackey (D. C.) 137, holding that a passenger who rides on the rear platform of a street car is guilty of contributory negligence, as matter of law, if there is standing room inside, where there are pendent straps, which he may hold while standing. It is not, as matter of law, contributory negligence to stand on the back platform of a street car, especially where all the seats are filled. Pendergast v. Railway Co., 10 App. Div. 207, 41 N. Y. Supp. 927.

[5] Matz v. Railway Co., 52 Minn. 159, 53 N. W. 1071; Fleck v. Railway Co., 134 Mass. 480. The fact that a passenger on a street car stands on the platform, when there is opportunity to take a seat inside, is no defense in an action against the owner of a truck, which collided with the street car, injuring the passenger. Connolly v. Ice Co., 114 N. Y. 104, 21 N. E. 101.

does the omission of the passenger to take hold of the rail on the platform, of itself, amount to contributory negligence; nor, in view of the common experience and practice, can it be said, as matter of law, that the two facts combined constitute negligence. It is a question for the jury.[6] The existence of snow and ice upon the platform is not necessarily such an element of danger as to be conclusive proof of negligence on the part of one who, with knowledge, undertakes to stand there for a moment or two, in expectation of the car's stopping to let him get off.[7] So knowledge by the passenger that an electric car is approaching a curve does not make his standing on the platform contributory negligence, as matter of law, since he has a right to assume that the car will not round the curve at a dangerous rate of speed.[8]

§ 169. SAME—FRONT PLATFORM OF STREET CAR.

It is not negligence per se for a passenger to ride on the front platform of a street car, though there is room inside, where the use of the platform is permitted by the company without objection.[1] Certainly, if the car

[6] Matz v. Railway Co., 52 Minn. 159, 53 N. W. 1071; Fleck v. Railway Co., 134 Mass. 480; Ginna v. Railroad Co., 67 N. Y. 596, affirming 8 Hun, 494.

[7] Fleck v. Railway Co., 134 Mass. 480.

[8] Blondel v. Railway Co. (Minn.) 68 N. W. 1079.

§ 169. [1] Upham v. Railway Co., 85 Mich. 12, 48 N. W. 199; Maguire v. Railroad Co., 115 Mass. 239; Burns v. Railway Co., 50 Mo. 139; Nolan v. Railroad Co., 87 N. Y. 63; Hadencamp v. Railroad Co., 1 Sweeney (N. Y.) 490; Taft v. Railroad Co., 14 Misc. Rep. 390, 35 N. Y. Supp. 1042; Seelig v. Railway Co., 18 Misc. Rep. 383, 41 N.

is crowded, the passenger cannot be blamed for riding on the front platform.[2] It has even been held that knowledge by a passenger of a rule of the company prohibiting passengers from standing on the front platform does not make his standing there negligence,

Y. Supp. 656. It is not negligence per se for a passenger to ride on the front platform of a street car, though there are vacant seats inside. Hastings v. Railroad Co., 7 App. Div. 312, 40 N. Y. Supp. 93. It is not negligence, as matter of law, for a passenger to ride on the front platform of an electric car, in the absence of a rule forbidding it. Bailey v. Traction Co. (Wash.) 47 Pac. 241. It is not negligence per se for a passenger to stand on the front platform of the trail car in a moving cable train, in the absence of any rule of the company against it, where it has been customary for passengers to occupy that position. Muldoon v. Railway Co., 7 Wash. 528, 35 Pac. 422. In an earlier New York case, however, it was held to be negligence, as matter of law, for a passenger to get on a street car so crowded that there is barely room for him to stand on the front platform. Tregear v. Railroad Co., 14 Abb. Prac. (N. S.) 49. It is for the jury to say whether a passenger on a street car propelled by electricity is guilty of contributory negligence in standing on the platform, where there are vacant seats in the car, and their finding that he was will not be disturbed by the court. Beal v. Railway Co., 157 Mass. 444, 32 N. E. 653.

[2] Archer v. Railway Co., 87 Mich. 101, 49 N. W. 488; West Philadelphia P. Ry. Co. v. Gallagher, 108 Pa. St. 524. A passenger who cannot get on the rear platform of a street car owing to its crowded condition is justified in getting on the front platform, and remaining there, where the car "appeared" to be full inside. He is justified in acting on appearances. Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 299, 10 South. 139. A boy passenger is not guilty of negligence, as matter of law, in riding on the front platform of a crowded street car, where he has been compelled by the conductor to give up his seat, and to stand on the platform. Sheridan v. Railroad Co., 36 N. Y. 39. A passenger is not guilty of negligence, as matter of law, in surrendering his seat to his wife, and in standing on the front platform,—the only place where he can be accommodated. Lehr v. Railroad Co., 118 N. Y. 556, 23 N. E. 889. It is not negligence per

as matter of law, but it is a question of fact for the jury, where the conductor accepted his fare without objection, and there is evidence that such a position is not obviously dangerous.[3] But a contrary ruling has been made in Maryland.[4]

Of course, circumstances may exist which will render riding on the front platform negligence per se. Thus, where there is room inside, it is negligence, as matter of law, for a passenger to continue to ride on the front platform, after he has been notified by the driver that it is unsafe and against the company's rules.[5] So it is contributory negligence, as matter of

se for a passenger on a motor car to stand on the front platform, holding with both hands onto the iron rod behind him, while the car is going rapidly over a road with curves; he having been directed by the conductor to stand there while smoking. Francisco v. Railroad Co., 88 Hun, 464, 34 N. Y. Supp. 859, distinguishing s. c. 78 Hun, 13, 29 N. Y. Supp. 247. A passenger who, in the nighttime, boards a street car in which there is no conductor, is not guilty of contributory negligence, as matter of law, in walking to the front platform, to ask the driver as to the destination of the car, and is not thereby debarred from recovering for injuries sustained by its derailment. Farrel v. Railroad Co., 51 Hun, 640, 4 N. Y. Supp. 597.

[3] Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 299, 10 South. 139.

[4] Baltimore & Y. Turnpike Road v. Cason, 72 Md. 377, 20 Atl. 113. A rule of a street-railway company prohibiting passengers from riding on the front platform of a street car is a reasonable regulation. Wills v. Railroad Co., 129 Mass. 351.

[5] Wills v. Railroad Co., 129 Mass. 351. A passenger who, on a cold, snowy night, when the tracks are icy, stands on the front platform of a street car, in which there are vacant seats, is guilty of contributory negligence, as matter of law. Bradley v. Railroad Co., 90 Hun, 419, 35 N. Y. Supp. 918. A passenger who stands on the very edge of a crowded street-car platform, without holding onto anything, is guilty of negligence, as matter of law. Ward v. Railroad Co., 33 N. Y. Super. Ct. 352.

law, for a passenger to ride on the driving bar of a street car,—a thin iron rail, not exceeding an inch in thickness,—even at the driver's invitation, if there is room inside.[6] So a passenger on a horse car, who, without invitation, when there is plenty of room inside, goes on the front platform, which is uninclosed, and there occupies the driver's stool, which is high, and without arms or other protection, is guilty of negligence, as matter of law; and there can be no recovery for his death, caused by his being thrown from his seat while the car was being rapidly driven onto a switch.[7] So, while, as a general proposition, it is not negligence, as matter of law, for a passenger to ride on the front platform of a street-railway car, yet a passenger who voluntarily so rides assumes the usual and ordinary dangers of his position. He is compelled to stand, and is not protected from the jolts and sudden movements of the car, except by the use of his eyes and hands. Hence a passenger injured by falling from the front platform of a street car cannot recover merely on proof that the driver whipped his horses, and that they made a sudden plunge, which caused the car to lurch. The driver has to use his whip, and it is not negligence for him to do so, any more than it would be on the part of a driver of any other vehicle.[8]

[6] Downey v. Hendrie, 46 Mich. 498, 9 N. W. 828.

[7] Mann v. Traction Co., 175 Pa. St. 122, 34 Atl. 572.

[8] Cassidy v. Railroad Co., 9 Misc. Rep. 275, 29 N. Y. Supp. 724.

§ 170. RIDING ON FOOTBOARD OR STEPS OF CAR.

Riding on the footboard of an open street car,[1] or on the steps of a closed car,[2] is not negligence, as matter of law, where the car is so crowded that there is no room either in the car or on the platform. No difference exists in this respect between electric cars and

§ 170. [1] Topeka City Ry. Co. v. Higgs, 38 Kan. 375, 16 Pac. 667; Bruno v. Railroad Co., 5 Misc. Rep. 327, 25 N. Y. Supp. 507; Wood v. Railroad Co., 5 App. Div. 492, 38 N. Y. Supp. 1077; City Ry. Co. v. Lee, 50 N. J. Law, 435, 14 Atl. 883; West Chicago St. R. Co. v. McNulty, 64 Ill. App. 549. It is not negligence, as matter of law, for a passenger to ride on the footboard of a crowded street car; and, where he is struck by a trolley pole in close proximity to the track, while reaching into his pocket to get his fare, the company will be liable for the injuries. Elliott v. Railway Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694. A passenger on a vehicle running in a highway for the carriage of passengers has a right to assume that those parts of the vehicle prepared for the use of passengers, and destined to receive them while in transit, are suitable and safe for the purpose, and that the care of the driver will avoid any special risks which attach to the particular position. Hence, where a stage sleigh is provided with wide footboards or guards, on the sides of which passengers usually ride when the seats are occupied, a passenger so riding is not chargeable with contributory negligence, as matter of law. Spooner v. Railroad Co., 54 N. Y. 230, reversing 36 Barb. (N. Y.) 217, 31 Barb. (N. Y.) 419.

[2] Clark v. Railway Co., 36 N. Y. 135, affirming 32 Barb. (N. Y.) 657; Saltzman v. Railroad Co., 73 Hun, 567, 26 N. Y. Supp. 311; Huelsenkamp v. Railway Co., 37 Mo. 538, overruling 34 Mo. 45; Pray v. Railway Co., 44 Neb. 167, 62 N. W. 447. It is not negligence, as matter of law, for a passenger to stand on the step of a car, outside of the gate placed between the step and the car platform, where he does so by direction of the driver, and because the car is so crowded that there is no room in the car or on the platform. Seymour v. Railway Co., 114 Mo. 266, 21 S. W. 739.

horse cars.[3] So, a passenger who has requested a street car to be stopped is not guilty of contributory negligence, as matter of law, in getting on the lower step of the car, to be in position to alight when it does stop.[4] It has even been held that riding on the footboard or car steps is not negligence per se, without reference to the question whether there is room in the car;[5] but there are authorities to the contrary.[6] A

[3] Wilde v. Railroad Co., 163 Mass. 533, 40 N. E. 851; McGrath v. Railroad Co., 87 Hun, 310, 34 N. Y. Supp. 365.

[4] Bowie v. Railway Co., 69 Miss. 196, 10 South. 574; Nichols v. Railroad Co., 38 N. Y. 131. For a passenger on a street car, after signaling the car to stop, to walk to the place from where they expect to alight, and there stand, waiting for the car to stop, is so common that such conduct cannot be said to be lack of ordinary care. North Chicago St. R. Co. v. Southwick, 66 Ill. App. 241. The question of the negligence of a passenger on an electric street car, in leaving his seat, and stepping onto the footboard, while the car is still in motion, is one of fact for the jury. Denver Tramway Co. v. Reid, 22 Colo. 349, 45 Pac. 378.

[5] Geitz v. Railway Co., 72 Wis. 307, 39 N. W. 866; Schwartz v. Railway Co., 8 Ohio Cir. Ct. 484. The jury is justified in finding a passenger guilty of contributory negligence in standing on the running board of an open street car when there is room inside. Schoenfeld v. Railway Co., 74 Wis. 433, 43 N. W. 162.

[6] Aikin v. Railroad Co., 142 Pa. St. 47, 21 Atl. 781; Ashbrook v. Railroad Co., 18 Mo. App. 290. It is negligence for a passenger on a street car to ride on the lower car step, without holding onto anything, if there is abundant room inside the car. McDonald v. Railway (Ala.) 20 South. 317. One who boards an elevated steam-railway car in motion, by getting on the sheet iron covering of the steps of the last platform on the train, and who keeps himself in that position by holding to the iron gate that bars his entrance there, until struck by a structure near the track, and knocked into the street below, is guilty of negligence, as matter of law. Carroll v. Transit Co., 107 Mo. 653, 17 S. W. 889.

passenger who rides on a car step assumes the ordinary hazards of that position, such as the risk of being thrown from the car by its usual motion. But he assumes no risk created by any unusual or dangerous rate of speed resulting from the negligent conduct of the driver,[7] or the hazard of a collision with a car on another track at a point where the two tracks are unusually close together.[8]

Of course, it is negligence, as matter of law, for a passenger to ride on the car step of a rapidly moving passenger train.[9] But it is not contributory negligence, as matter of law, for a passenger to go upon the lower step of a slowly moving car, and standing there, and waiting, while the car is slowly moving, with the intention of alighting when the train should cease to move; and this is true, although the passenger is carrying a child in her arm.[10]

[7] Willmott v. Railway Co., 106 Mo. 535, 17 S. W. 490.

[8] Herdt v. Railroad Co., 65 Hun, 625, 20 N. Y. Supp. 346. The defense of contributory negligence, in that plaintiff, a newsboy, was standing on the footboard of a street car, when he was knocked off by defendant's wagon, is not available to defendant, though it might be to the street-car company. Mills v. Wolverton, 9 App. Div. 82, 41 N. Y. Supp. 90, following Connolly v. Ice Co., 114 N. Y. 104, 21 N. E. 101.

[9] Cincinnati, L., St. L. & C. Ry. Co. v. McClain (Ind. Sup.) 44 N. E. 306. A 15 year old boy, of average intelligence, is guilty of contributory negligence, as matter of law, in going upon the lowest step of the car to vomit, though there is only standing room in the car. Cleveland, C., C. & St. L. Ry. Co. v. Moneyhun (Ind. Sup.) 44 N. E. 1106.

[10] Cincinnati, H. & I. R. Co. v. Revalee (Ind. App.) 46 N. E. 352. But see ante, § 157.

§ 171. RIDING IN BAGGAGE CAR.

A passenger who willfully violates a known rule of a railroad company, prohibiting passengers from riding in the baggage car, is guilty of contributory negligence, as matter of law, and cannot recover for injuries sustained in consequence of his so riding.[1] "The baggage car," it is said, "is a known place of danger. In this respect it differs from the cowcatcher and the platform only in degree. It is placed ahead of the passenger car, and next to or near the locomotive. In cases of collision, it is the first car to give way to the shock, and is frequently the only one seriously injured." [2]

Circumstances, however, may justify the passenger in riding in the baggage car. Thus, where, during a journey, a railroad company drops off its passenger coaches from a mixed train, and offers to passengers conveyance in the baggage car, a passenger who accepts the offer does not assume the risk, nor is he guilty of negligence in so doing.[3] So an express messenger is not chargeable with contributory negligence in riding in the baggage car, as required by his contract of

§ 171. [1] Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21; Peoria & R. I. R. Co. v. Lane, 83 Ill. 448. A passenger on a railway train, who, instead of occupying a coach provided for passengers, remains, without necessity therefor, in the baggage car, and there receives an injury in the wreck of the train, which he would have avoided had he remained in the passenger coach, is guilty of contributory negligence. Houston & T. C. R. Co. v. Clemmons, 55 Tex. 88.

[2] Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21.

[3] Baltimore & P. R. Co. v. Swann, 81 Md. 400, 32 Atl. 175.

employment, and may recover for an injury caused by the engine and baggage car falling through a bridge, though none of the passenger coaches went through. He assumes only the risks incident to the character of the baggage car, and the goods carried thereon, and not the risk incident to the defect of the roadbed.[4] So, where it has been customary for a railroad company to transport its employés on a baggage car to and from their work, they are not guilty of contributory negligence, as matter of law, in riding there.[5] So it is not negligence, as matter of law, for a passenger to go into the baggage car while the train is standing at a station.[6]

Does a conductor's permission to ride in the baggage car, or in any other dangerous place, relieve the passenger from the charge of contributory negligence? The true view would seem to be that no permission or invitation of a conductor will justify a passenger in riding in a place so obviously dangerous that a man of ordinary prudence would not assume the risk.[7]

[4] San Antonio & A. P. Ry. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

[5] O'Donnell v. Allegheny R. Co., 59 Pa. St. 239.

[6] Gardner v. Railroad Co., 94 Ga. 538, 19 S. E. 757; Jones v. Railway Co., 43 Minn. 279, 45 N. W. 444. Where a passenger, while the train is standing at the station, goes into the baggage compartment of a combination passenger and baggage car, for the purpose of seeing the conductor upon legitimate business connected with the journey, the question whether or not the passenger was rightfully in the baggage compartment is for the jury; and it is error for the court to direct a nonsuit in an action for injuries sustained in a concussion between it and another car while being coupled. Gardner v. Railroad Co., 97 Ga. 482, 25 S. E. 334.

[7] Downey v. Hendrie, 46 Mich. 198, 9 N. W. 828. Where a passen-

Now, a baggage car does not seem to be a place of such obvious danger, and it would seem to be a proper question for the jury whether a passenger who rides in the baggage car with the conductor's permission is guilty of contributory negligence. This is the rule adopted by some of the courts.[8] This position, however, has been vigorously criticised by the supreme court of Pennsylvania, which holds that a conductor's permission to ride in the baggage car will not render the company liable, if the passenger knew the company's rule prohibiting it.[9]

Suppose a passenger injured while riding in a baggage car would have been injured in a wreck or colli-

ger assumes a brakeman's position on a train at the conductor's request, the mere fact that the position thus assumed is one of greater hazard than his seat is not such negligence, as matter of law, as will debar a recovery for injuries sustained. The taking of a hazardous position at the conductor's request is not negligence, unless it is so obviously dangerous that no prudent person would take it. Chamberlain v. Railroad Co., 11 Wis. 248. See, also, ante, § 131.

[8] Jacobus v. Railway Co., 20 Minn. 125 (Gil. 110); Watson v. Railway Co., 24 U. C. Q. B. 98. The fact that a railway company has a rule prohibiting passengers from being carried in its baggage cars does not absolve it from the duty of care towards passengers who are in a baggage car, if it habitually disregards the rule, and permits passengers to ride in such cars. Jones v. Railway Co., 43 Minn. 278, 45 N. W. 444.

[9] Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21. The court says: "There can be no license to commit suicide. It is true, the conductor has charge of the train, and may assign passengers their seats. But he may not assign a passenger to a seat on the cowcatcher, a position on the platform, or in the baggage car. We are unable to see how a conductor, in violation of a rule of the company, can license a man to occupy a place of danger, so as to make the company responsible. It is otherwise as to rules which are intended merely for the convenience of the company or its passengers."

sion even if he had been in his proper place in the train, is he still prevented from recovering? The court of appeals of New York holds that the mere presence of a passenger on a baggage car at the time of a collision is not contributory negligence, as matter of law, if his being there did not contribute to the injury.[10] When contributory negligence is interposed as a defense to an action against a railroad company for negligently injuring a passenger, and the supposed negligence consists in the fact that the passenger voluntarily occupied a position in the train which was more dangerous than the position he should have occupied, the nature of the accident should be considered; and if, upon such consideration, it appears that the danger of injury from that particular accident was materially increased by the fact that the passenger was in that particular place, instead of the place he should have occupied, he ought not to recover. But if the nature of the accident be such that the danger of injury was not enhanced in consequence of the position occupied by the passenger, or if the accident was of such a nature as was as likely to occur in one position of the train as another, his right to recovery will not be affected by the fact that he was in an improper place.[11]

[10] Webster v. Railroad Co., 115 N. Y. 112, 21 N. E. 725, affirming 40 Hun, 161.

[11] Kentucky Cent. R. Co. v. Thomas' Adm'r, 79 Ky. 160. In this case it was held that a passenger riding on the express car, which is in front of the regular passenger coaches, cannot recover for injuries sustained in a collision of the engine with animals on the track. In Fremont, E. & M. V. R. Co. v. Root (Neb.) 69 N. W. 397,

§ 172. RIDING IN OTHER PLACES OF ALLEGED DANGER.

A railroad company is responsible for the safety of passengers in any place which it provides for their accommodation; and riding in the smoking car, next to the locomotive, which is perhaps not the safest place on the train, is not contributory negligence.[1] So a postal clerk not on duty, and returning to his home from a run, is not guilty of contributory negligence, as matter of law, in riding on the postal car, with the conductor's permission, and in the absence of a rule of the company prohibiting it.[2] But it has been held con-

it was held that, if the presence of a passenger in the express car is the proximate cause of his injury, he cannot recover; but if not the proximate cause of the injury, or if the risk of such particular injury was not increased by the action of the passenger, then it is no defense that he voluntarily assumed the position in the express car. In Carroll v. Railroad Co., 1 Duer (N. Y.) 571, it was said that the presence of a passenger in a baggage car does not contribute to a collision with another train. Hence, if he is injured in such collision, he may recover, though he would not have been injured if he had been in a passenger car on the train. This position is radically unsound. The question is not whether the passenger's position contributed to the collision, but to his injury.

§ 172. [1] Goble v. Railroad Co., 10 Fed. Cas. 502.

[2] Baltimore & O. R. Co. v. State, 72 Md. 36, 18 Atl. 1107. The court said: "There was no rule of the company forbidding the deceased to enter the car, and occupy the same, if he was not in actual service. It was his habit to occupy it when he was returning from duty, whenever he chose; and the conductor, who is conceded to be the general agent of the company, not only made no objection, but permitted him, from time to time, to do so. There are cases, no doubt, where the invitation or permission of the conductor would not protect a man in running a risk which was so obviously dangerous that a prudent man would not think of incurring it. To justify a court in saying

tributory negligence for a passenger to ride in an express car, in violation of a known rule of the company, where such violation brings on the passenger an injury from which he would have escaped had he been in the regular passenger coach.[3]

Where the train on a cable railway consists of a "dummy" or "grip" car and a trailer, a passenger is not chargeable with negligence in taking a seat in the dummy car, instead of in the trailer.[4] So a passenger on a stagecoach riding on the outside, who refuses to take an inside seat when requested by the agent of the stage line, assumes only the peculiar risk of his exposed position, but not that resulting from the negligence of the driver.[5]

that conduct is per se negligence, the case must present some such feature of recklessness as would leave no opportunity for difference of opinion as to its imprudence in the minds of ordinarily prudent men." An employé of a theatrical company was riding in a show car, to care for the company's property carried therein, as was his duty. The car was strong and well built, and was fitted up for the accommodation of theatrical employés, whose duty it was to remain there. Held, that the fact that such employé left a passenger coach, and was riding in the show car next to the engine when a collision occurred, was not negligence, as matter of law, but that it was a question of fact for the jury. Blake v. Railway Co., 89 Iowa, 8, 56 N. W. 405, distinguishing s. c. 78 Iowa, 57, 42 N. W. 580.

[3] Florida South. Ry. Co. v. Hirst, 30 Fla. 1, 11 South. 506. It was further held that the conductor is without authority to waive such a rule, but that the habitual violation of the rule with the permission of the company amounts to a waiver.

[4] Dawkins v. Railway Co., 3 Wash. St. 592, 28 Pac. 1021; Cohen v. Railway Co., 9 C. C. A. 223, 60 Fed. 698.

[5] Keith v. Pinkham, 43 Me. 501.

§ 173. RIDING ON FREIGHT AND CONSTRUCTION TRAINS.

Riding in the caboose of a mixed freight and passenger train, with the permission of the conductor, is not such negligence as will prevent a passenger from recovering for injuries sustained through a misplaced switch.[1] As a general rule, when passengers are accepted on freight trains, it is their duty to ride in the caboose. A passenger who seats himself on a coal car,[2] or a freight car,[3] when he could have taken a seat in the caboose, is guilty of contributory negligence, as matter of law, though he does so at the invitation of a brakeman.[4]

But a stock drover carried free of charge, for the purpose of looking after his stock, is not guilty of contributory negligence, as matter of law, in riding on the stock car, in accordance with the custom in such cases.[5] And even where the rules of a railroad company forbid drovers or their servants to ride in stock cars, there is no presumption against the authority of the conductor to allow them to visit the car, and look after the stock, while the train is stopping at the station.[6] But a written contract with a railway company, signed by a shipper of live stock, providing that such

§ 173. [1] Creed v. Railroad Co., 86 Pa. St. 139.

[2] Woods v. Jones, 34 La. Ann. 1086.

[3] Player v. Railway Co., 62 Iowa, 723, 16 N. W. 347.

[4] Atchison, T. & S. F. Ry. Co. v. Johnson, 3 Okl. 41, 41 Pac. 641.

[5] Lawson v. Railroad Co., 64 Wis. 447, 24 N. W. 618.

[6] Olson v. Railroad Co., 45 Minn. 536, 48 N. W. 445; Florida Ry. & Nav. Co. v. Webster, 25 Fla. 395, 5 South. 714.

shipper, while being carried on the train transporting his stock, shall remain in the caboose car attached to the train while the same is in motion, is valid and binding as between the parties thereto. Such a contract is a reasonable one, intended for the safety and convenience of the shipper, as well as for the protection of the railway company carrying him. It does not contravene any law or a sound public policy.[7] And a drover who rides in the stock car, in violation of such a contract, is guilty of negligence, as matter of law, and there can be no recovery for his death caused by the derailment of the stock car.[8] But a condition in a stock pass that the drover shall remain in the caboose while the train is in motion does not prevent him from entering the stock car, for the purpose of looking after his cattle, while the train is stationary.[9] So a custom on the part of conductors permitting owners of fine horses to ride in the car with them waives a stipulation in the shipping contract requiring the owner to ride in the caboose.[10]

[7] Ft. Scott, W. & W. Ry. Co. v. Sparks, 55 Kan. 288, 39 Pac. 1032.

[8] Hemmphreus v. Railroad Co. (S. D.) 65 N. W. 466.

[9] Texas & P. Ry. Co. v. Reeder, 22 C. C. A. 314, 76 Fed. 550.

[10] Missouri, K. & T. Ry. Co. of Texas v. Cook (Tex. Civ. App.) 33 S. W. 669. A condition in a shipping contract requiring the owner of stock to ride in the caboose may be waived by the agents of the company having the legal or apparent power to act. Both the station agent signing the contract and the conductor of the train have this power. Such a waiver is valid, whether in writing or by parol, and no additional consideration is necessary to make it valid. The declaration of the conductor, in taking up the shipper's ticket, that he could ride in the car with his horse, is admissible as part of the res gestæ. So it is competent to prove a custom of conductors to allow shippers of fine stock to ride in the car with it, as bearing on the

Persons riding on a construction train, which has no caboose attached, are not guilty of contributory negligence, as matter of law, in riding on the flat car next to the engine, though there is a box car immediately in the rear of the flat car.[11] So, the fact that a passenger on a construction train was told to ride on the tender, and not to get on the gravel cars, will not prevent recovery for an injury sustained, while on a gravel car, in a collision with another train, unless it is shown that his disobedience of the order contributed to the injury.[12]

§ 174. RIDING ON TOP OF CAR.

One who rides on a projection or cupola several feet above the roof of a caboose, instead of inside the caboose, is guilty of contributory negligence, as matter of law.[1] A passenger who rides on top of a box car, instead of in the caboose, is guilty of negligence, as matter of law, and there can be no recovery for his

conductor's power to waive the stipulation requiring the drover to ride in the caboose. Missouri, K. & T. Ry. Co. v. Cook, 8 Tex. Civ. App. 376, 27 S. W. 769. Though a contract for the shipment of stallions prohibits the drover from riding in the same car with them, it is not error to admit evidence that, in shipping two stallions in the same car, it is necessary for some one to be in the car with them, and also that a custom exists between the company and shippers of stallions and other valuable horses permitting drovers to accompany stock and take care of it. Such evidence is competent as showing a waiver of the prohibitory clause in the contract. Chicago, B. & Q. R. Co. v. Dickson, 143 Ill. 368, 32 N. E. 380; s. c. 42 Ill. App. 363.

11 Berry v. Railway Co., 124 Mo. 223, 25 S. W. 229; Wagner v. Railway Co., 97 Mo. 512, 10 S. W. 485.

12 Lawrenceburgh & U. M. R. Co. v. Montgomery, 7 Ind. 473.

§ 174. 1 Tuley v. Railroad Co., 41 Mo. App. 432.

death in a derailment, where no one in the caboose was injured.[2]

So a drover, who rides on the top of a cattle car, when there is a passenger car attached to the train, is guilty of contributory negligence, as matter of law, and cannot recover for injuries sustained from the derailment of the car.[3]

But where a railroad company cuts out the caboose on its stock trains, a stock drover is not guilty of negligence in riding on top of a car to the stockyards, in accordance with a uniform custom, sanctioned by the company.[4] So a drover who goes forward to examine his stock while the train is stationary is not guilty of contributory negligence, as matter of law, in climbing on top of the train as it suddenly starts, and in walking back to the caboose, as it is customary for drovers to do in the circumstances. Nor is he chargeable with negligence in failing to look towards the front of the train while so walking, and he is not thereby debarred from recovering for injuries sustained by being struck by an overhead bridge, of the location of which he had no knowledge or warning.[5] Consent of the train hands to a drover's riding on top of a cattle car makes the question of his contributory negligence one of fact for the jury, though in so doing he ignorantly violates a rule of the company.[6] But a direction of a

2 Beyer v. Railroad Co. (Ala.) 21 South. 952.

3 Little Rock & Ft. S. Ry. v. Miles, 40 Ark. 298.

4 Tibby v. Railway Co., 82 Mo. 292.

5 Chicago, M. & St. P. Ry. Co. v. Carpenter, 5 C. C. A. 551, 56 Fed. 451.

6 New Orleans & N. E. R. Co. v. Thomas, 9 C. C. A. 29, 60 Fed. 379.

station agent to a cattle drover to ride on top of the cattle car, instead of in the passenger car attached to the train, does not relieve the drover of contributory negligence in riding on top of the car. The station agent has no implied authority to direct a passenger where to ride. That is the business of the conductor.[7] The courts, however, have not as yet gone so far as to require the conductor to use force to compel a passenger to remain in the car provided for him. A request by the conductor of a mixed freight and passenger train to a passenger riding on top of a freight car, that he come into the passenger car, is sufficient; and, if unheeded, the carrier is not liable for injuries to the passenger, who fell from the train while in motion.[8]

But in St. Louis S. W. Ry. Co. v. Rice, 9 Tex. Civ. App. 509, 29 S. W. 525, it was held that the fact that a caboose is crowded does not justify a passenger in riding on top thereof, even with the conductor's consent, if it was a place of obvious danger, and not allotted by the company for the use of passengers. In Atchison, T. & S. F. R. Co. v. Lindley, 42 Kan. 714, 22 Pac. 703, it was held that a shipper of stock, who obeys the order of a conductor to get on top of the car at a station, and signal to the train hands to enable them to perform their duties, voluntarily places himself in a position of known danger; and, as he is not on top of the train to look after or care for his stock, the company is not liable for injuries sustained in being thrown from the train by a sudden jerk of the engine.

7 Little Rock & Ft. S. Ry. Co. v. Miles, 40 Ark. 298.

8 Anfelenberg v. Railway Co., 132 Mo. 565, 34 S. W. 485. See, also, ante, § 167.

§ 175. RIDING ON LOCOMOTIVE OR ON TENDER.

It is contributory negligence, as matter of law, for a passenger to ride on the locomotive.[1] The fact that he is there at the invitation of the conductor or engineer is immaterial; and so is the fact that he was ignorant of a rule prohibiting all persons except the engineer and fireman from riding there.[2] So, it is negligence, as matter of law, for a passenger to ride on the footboard of the engine,[3] or on the pilot or cowcatcher.[4] So an employé of a railroad company, who, while being carried from his work on a train consisting of an engine, tender, and gondola car, sits on a nar-

§ 175. [1] McGucken v. Railroad Co., 77 Hun, 69, 28 N. Y. Supp. 298.

[2] Texas & P. Ry. Co. v. Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086. A locomotive engineer has no authority or right to say who shall be upon the train, or give permission to any one to ride upon his engine, against the rules of the company. Chicago & A. R. Co. v. Michie, 83 Ill. 427. A passenger on a construction train, who leaves his place on a car where it is customary for passengers to ride, and, at the request of a fireman, commences to clean the headlight of the engine, is guilty of negligence. Brown v. Scarboro, 97 Ala. 316, 12 South. 289.

[3] Wilcox v. Railway Co. (Tex. Civ. App.) 33 S. W. 379; Chicago & N. W. Ry. Co. v. Rielly, 40 Ill. App. 116.

[4] Downey v. Railway Co., 28 W. Va. 732. Knowledge or consent of train hands is immaterial. Id. A full-blooded negro, having the ordinary intelligence of his race, may be found by the jury to be guilty of contributory negligence in riding on the pilot of a locomotive engine, though directed so to do by the train hands. Rucker v. Railway Co., 61 Tex. 499. A trespasser riding on the pilot of a locomotive engine is guilty of contributory negligence, which will preclude recovery for injuries sustained in a collision, though the company's servants were guilty of negligence, and knew of the dangerous position of the trespasser, and did not warn him off. Darwin v. Railroad Co., 23 S. C. 531.

row platform in the rear of the tender, with his legs and feet hanging over the edge, in spite of repeated warnings from his superiors and fellow servants, is guilty of contributory negligence, as matter of law.[5]

But to take a seat in the cab of a locomotive by the direction of the engineer, in sole charge of the train, is not contributory negligence, as matter of law, on the part of a passenger who has paid his fare, where passengers are habitually or occasionally carried in the same or like places on the train.[6] So, where it is customary for a railroad company to carry stock drovers on the stock car or the switch engine from a point near Chicago to the stock yards, and no other mode of transportation is provided, it is a question for the jury whether a stock drover, who rides on the footboard of the engine by direction of the engineer, is guilty of negligence. "It cannot be said, as matter of law, that a prudent and ordinarily cautious man would not, under any circumstances, ride a short distance upon an engine. Experience has shown there is some danger in the safest mode of railway travel, and it cannot be said that one must not take a particular mode of travel because it is dangerous. The question can only be determined, as before stated, by a consideration of all the attending circumstances." [7]

[5] Lehigh Val. R. Co. v. Greiner, 113 Pa. St. 600, 6 Atl. 246.

[6] Hanson v. Transportation Co., 38 La. Ann. 111.

[7] Lake Shore & M. S. R. Co. v. Brown, 123 Ill. 162, 14 N. E. 197. In such a case, it cannot be said, as matter of law, that the drover is chargeable with contributory negligence because he failed to take a street-car line to the stock yards. Id.

§ 176. RIDING ON HAND CAR.

In Indiana it has been held that to voluntarily ride on a hand car in the nighttime is contributory negligence, which precludes recovery for death caused by a collision with an engine.[1] But in Wisconsin it has been held that a passenger transported by a railroad company on a hand car is not guilty of contributory negligence, as matter of law, in riding on the rear end of the car, with his legs hanging over, where he has been directed so to do by the person in charge of the car.[2]

§ 177. STATUTORY PROHIBITION AGAINST RIDING IN DANGEROUS PLACES.

Statutes exist in many of the states which relieve railroad companies from liability for injuries to passengers sustained while riding on the platform of a car, or on any baggage, wood, gravel, or freight car, in violation of printed regulations conspicuously posted inside of passenger coaches on the train, or in violation of positive verbal instructions given to the passenger by any of the officers in charge of the train, provided there is room inside the passenger coaches for the accommodation of passengers.[1] Such a statute is

§ 176. [1] Ream v. Railroad Co., 49 Ind. 93.

[2] Pool v. Railway Co., 56 Wis. 227, 14 N. W. 46; Id., 53 Wis. 657, 11 N. W. 15.

§ 177. [1] Civ. Code Cal. § 484; Rev. St. Ind. 1894, § 5192 (Rev. St. Ind. 1881, § 3928); 1 How. Ann. St. Mich. § 3386; Rev. St. Mo. 1889, § 2587; Comp. St. Neb. 1893, p. 310, § 110; Gen. St. Nev. 1885, § 882; Revision N. J. p. 934, § 121; Comp. Laws N. M. 1884, § 2674; Laws

to be strictly construed; and, in order that it be applicable to a passenger riding on the platform, the car must be in motion when the accident occurs, and there must be some connection of cause and effect between the injury of the passenger and his being on the platform.[2] To render applicable a statutory prohibition against riding on the platform if there is sufficient room inside the car "for the proper accommodation of passengers," the company must furnish a seat for the passenger, and not merely standing room; and unless it does so a passenger is not guilty of contributory negligence, as matter of law, in riding on the platform.[3] So the statute does not apply to a passenger who, seeing that a collision with another train is inevitable, attempts to escape from the car, and reaches the platform just as the collision occurs;[4] nor to a passenger who, at the invitation of the brakeman, goes on the platform, to be in readiness to alight as soon as the train shall stop.[5] So the statutory prohibition against

N. Y. 1850, c. 140, § 46; Code N. C. 1883, § 1978; 2 Comp. Laws Utah 1888, p. 32, § 2353. Laws N. Y. 1878, c. 261, makes it a misdemeanor for any person not a railroad employé to ride on a wood or freight car. Civ. Code Cal. § 483, provides that when fare is taken for transporting passengers on any baggage, wood, gravel, or freight train, the same care must be taken, and the same responsibility is assumed, by the corporation as for passengers on passenger cars.

[2] Omaha & R. V. Ry. Co. v. Chollette, 41 Neb. 578, 59 N. W. 921.

[3] Choate v. Railway Co., 67 Mo. App. 105.

[4] Buel v. Railroad Co., 31 N. Y. 314. Nor does the statute apply to the case of a passenger who goes on the platform in fear that some disaster will occur because of the speed of the train, and with the intention of jumping into a pile of sand. Mitchell v. Railroad Co., 87 Cal. 62, 25 Pac. 245.

[5] Baltimore & O. R. Co. v. Meyers, 10 C. C. A. 483, 62 Fed. 367.

riding on the platform does not apply to street railways.[6] And where a railroad company does not post notices in its passenger cars prohibiting passengers from riding in the baggage car, the presence of a passenger in a baggage car when injured in a collision does not bar a recovery, if he was there with the knowledge and consent of the conductor.[7] But the statutory prohibition against riding on the platform is not waived by the conductor's failure to object, if there is sufficient room inside for the accommodation of passengers.[8]

§ 178. SAVING HUMAN LIFE.

It is not contributory negligence in a person to risk his life, or place himself in a position of great danger, in an effort to save the life of another, or to rescue another from sudden peril or great bodily harm. "The law has so great a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute negligence in the judgment of prudent persons." [1] Thus a passenger at a station, noticing an intoxicated

[6] Vail v. Railroad Co., 147 N. Y. 377, 42 N. E. 4, affirming 6 Misc. Rep. 20, 26 N. Y. Supp. 59; Lax v. Railroad Co., 46 N. Y. Super. Ct. 418. A statute providing that street-railway companies shall not be liable for injuries to persons getting on or off at the forward end of the car does not apply to a passenger not getting on or off at the time of his injury, but riding on the steps of the platform, with the knowledge and consent of the driver. Seymour v. Railway Co., 111 Mo. 266, 21 S. W. 739.

[7] Carroll v. Railroad Co., 1 Duer (N. Y.) 571.

[8] Higgins v. Railroad Co., 2 Bosw. (N. Y.) 132.

§ 178. [1] Peyton v. Railway Co., 41 La. Ann. 861, 6 South. 690.

friend on the track, in dangerous proximity to an approaching train, and apparently unconscious of peril, is not guilty of contributory negligence in rushing on the track, and pushing his friend off, though he is himself struck by the pilot beam of the locomotive.[2] So, where a child is thrown from a car platform at a station by a concussion of cars, its mother is not chargeable with contributory negligence in thrusting her arm under the wheels to save her child from being crushed to death.[3] In Michigan, however, it was held that an attempt to board a train running at the rate of four miles per hour is negligence, as matter of law, though made for the purpose of informing the conductor of a broken rail, and thus avert a threatened disaster.[4]

§ 179. AFTER THE INJURY.

It is the duty of one who receives personal injuries from the negligence of another to use ordinary care and prudence to have himself cured, and he forfeits his right to recover damages that might have been saved, and which resulted from his own negligence in failing to adopt means of cure.[1] But the injured person is not re-

[2] Id.

[3] De Mahy v. Steamship Co., 45 La. Ann. 1329, 14 South. 61.

[4] Blair v. Railway Co., 60 Mich. 124, 26 N. W. 855. This case was probably correctly decided on the ground that defendant had not been guilty of negligence, but it is very questionable whether an attempt to board a moving train under these circumstances is contributory negligence, as matter of law.

§ 179. [1] Gulf, C. & S. F. Ry. Co. v. Coon, 69 Tex. 730, 7 S. W. 492; Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 424, 3 N. E. 389, 4 N. E. 908; Secord v. Railway Co., 18 Fed. 221. The failure

sponsible for a mistake; and when he acts in good faith, and under the advice of a competent physician, even if it is erroneous, the error will not shield the wrongdoer.[2] And a person injured by the negligence of another, who does an act which aggravates the injury, may recover for the aggravation, if his own act was not

of an injured passenger to consult a physician or to take any medicine for a week after the accident requires the court to submit to the jury the question of fact whether she failed to exercise ordinary care in the means employed to effect a cure. Allender v. Railroad Co., 37 Iowa, 264. One injured by another's negligence cannot recover for any aggravation of the injury caused by his failure to use ordinary care in securing medical treatment, and in continuing the same so long as his injuries appear reasonably to require it. But the burden of proving that plaintiff's injury was aggravated by his failure to use ordinary care in procuring medical attention is on defendant. Citizens' St. R. Co. v. Hobbs (Ind. App.) 43 N. E. 479.

[2] Lyons v. Railway Co., 57 N. Y. 489. One who receives a physical injury at the hands of another cannot be expected to know in every instance the most prudent thing for him to do, and should not be held negligent because his sufferings are such that they impel him to a course apparently favorable to his recovery. Gulf, C. & S. F. Ry. Co. v. McMannewitz, 70 Tex. 73, 8 S. W. 66. Where a woman four months advanced in pregnancy steps into a hole in the station platform, and receives a jar, the failure of herself and husband to call a physician immediately is not contributory negligence, if no apprehension of immediate injury to health was created by the injury. Texas & P. Ry. Co. v. Neal (Tex. Civ. App.) 33 S. W. 633. That the injured party does not follow the best remedies, or that he may not implicitly follow the directions of his physician, is not such contributory negligence which will, as matter of law, preclude recovery for an injury negligently inflicted, which produced, as its direct effect, a disease from which death ensued. The law lays down no exact standard of duty here. It should be left to the jury as to the reasonableness of the conduct, and whether or not death was caused by the injury. Texas & St. L. Ry. v. Orr, 16 Ark. 182.

negligent.[3] So the use of a patent medicine by plaintiff upon his hurts is no evidence of want of care in treating his injuries, unless it is shown that such medicine is injurious to health. A patent medicine may or may not be a curative agent.[4]

[3] Hope v. Railroad Co., 40 Hun, 438.

[4] Gulf, C. & S. F. Ry. Co. v. Brown, 4 Tex. Civ. App. 435, 23 S. W. 618.

CHAPTER XI.

CONTRIBUTORY NEGLIGENCE (Continued)—PERSONS UNDER DISABILITY.

§ 180. The General Rule.
181. Persons under Physical Disability.
182. Same—Women.
183. Persons with Defective Reasoning Faculties—Children.
184. Same—Intoxicated Persons.
185. Persons in Position of Peril.
186. Same—Defendant must be Guilty of Negligence.
187. Same—Apprehension of Danger must be Reasonable.
188. Same—Avoiding Inconvenience.

§ 180. THE GENERAL RULE.

While the standard of care does not vary with the ability of each individual, yet an individual need exercise only such care as can be reasonably expected of persons of the recognized class to which he belongs. In addition to normal persons, the law recognizes two exceptional classes: (1) Persons laboring under some physical disability, such as the blind, deaf, or crippled. (2) Persons whose reasoning faculties are defective, such as children, lunatics, intoxicated persons, and persons in position of peril.

So far as the subject of contributory negligence is concerned, the courts have clearly recognized the doctrine that responsibility is graduated according to ca-

pacity, and determined by recognized classes.[1] "To escape the responsibility of contributory negligence, plaintiff is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which he or she belongs, if that class is numerous enough to have a well-recognized existence, and is one which reasonably informed men must be aware may be commonly exposed to injuries similar to that on which the action is founded." [2]

§ 181. PERSONS UNDER PHYSICAL DISABILITY.

The fact that a person labors under some physical disability does not debar him from traveling.[1] It is not negligence for a blind man to travel without an attendant, so as to bar recovery for his death in a collision, though he might have escaped from the car in safety if he had not been blind.[2] But a passenger with impaired vision, about to alight from a train, must make proper use of his organs of hearing, and is guilty of contributory negligence, as matter of law, in stepping on a parallel track in front of an approaching

§ 180. [1] 2 Jag. Torts, 871, 872.

[2] Dimmey v. Railroad Co., 27 W. Va. 32.

§ 181. [1] As to duty of carrier to infirm passenger, see ante, c. 8.

[2] St. Louis, I. M. & S. Ry. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472. The fact that a passenger alighting from a ferryboat in the dark is nearsighted, and by reason of that fact steps into an unguarded and unlighted opening between the ferryboat and the dock, does not show her guilty of contributory negligence, though a person with good eyesight might have discovered the danger. Drake v. Town of Dartmouth, 25 N. S. 177.

train, the noise of which could be heard for a mile.[3] So a lame passenger is required to exercise more caution in getting on a train than otherwise might be demanded of him.[4] But the fact that a passenger is crippled, and uses a crutch and cane, does not render it contributory negligence for him to ride on the footboard of a crowded street car, so as to preclude a recovery for injuries sustained in being squeezed by another car, near the intersection of a switch track with the main track.[5]

§ 182. SAME—WOMEN.

In determining whether a woman has exercised reasonable care, the jury may take into consideration her age, sex, and physical condition.[1] Thus, where a wo-

[3] Gonzales v. Railroad Co., 33 N. Y. Super. Ct. 57. But see same case on appeal, 38 N. Y. 440.

[4] Snowden v. Railroad, 151 Mass. 220, 24 N. E. 40. It is negligence per se for a man so crippled that he can scarcely get on or off a train while at rest to attempt to board a moving train. Cincinnati, H. & D. Ry. Co. v. Nolan, 8 Ohio Cir. Ct. 347.

[5] Topeka City Ry. Co. v. Higgs, 38 Kan. 375, 16 Pac. 667. A passenger who understands the English language imperfectly is not chargeable with contributory negligence in not giving heed to warnings of an impending collision with another train, and in resisting friendly efforts to drag him from the car, if he did not understand the words addressed to him, or know the object and reason of the violent efforts made by the person who attempted to remove him from the danger. Walter v. Railroad Co., 39 Iowa, 33.

§ 182. [1] Hickman v. Railway Co., 91 Mo. 434, 4 S. W. 127. This was a case where a woman 65 years old, and weighing 170 pounds, was injured while alighting from a train. The court said: "She was required to use only such ordinary care and diligence as a prudent person in her situation would use; and how could the jury determine whether she had acted with the ordinary care and diligence with

man jumps from a street car when the horses are running away, the question whether she is guilty of contributory negligence depends on the question whether a person of ordinary prudence, of the same class to which she belongs, would act in a similar manner.[2] But, on the other hand, a young, active man may prudently alight from a moving train, when the attempt would be reckless in an old or a lame man; and any man may do so prudently when it would be dangerous for a woman in female attire to attempt it.[3]

The fact of pregnancy is also to be taken into account by the jury in determining whether or not a female passenger exercised reasonable care. Thus, it has been held that the question whether a married woman in the early stages of prospective maternity is guilty of negligence in jumping from the car steps to the ground, with the conductor's assistance, and in afterwards riding in a buggy to her home, rather than remain at the station, and take immediate precautions to obviate the threatened consequences, is for the jury. In this case, Chief Justice Bleckley said: "Such

which a prudent person would have acted in her situation, unless they considered that situation, her environment, how a prudent mind would have guided the action of such a body as she possessed? And how could they do this without considering that body, its sex, its age, and its physical condition?"

[2] Dimmey v. Railroad Co., 27 W. Va. 32.

[3] Little Rock & Ft. S. Ry. Co. v. Tankersley, 54 Ark. 25, 14 S. W. 1099. A female passenger in an enfeebled condition, who, not having time to leave the train during its stop at her place of destination, leaps therefrom after it gets in motion, without any warning to the conductor or other employé, is guilty of negligence, as matter of law. Louisville & N. R. Co. v. Lee, 97 Ala. 325, 12 South. 48.

knowledge as we possess in respect to risks which prudent women may or may not take in the early stages of prospective maternity does not enable us to detect, in the light of the record before us, the mistake of the jury, if they committed any, in deciding the question of fact with which they had to deal. The conformity of their verdict to law and to the charge of the court depends on whether they had a correct standard of the prudent pregnant woman in their minds, and whether they correctly compared therewith the conduct of plaintiff. We can only hope the jury went right in both these respects, for the plain truth is we do not know whether they did or not." [4]

In the days before the advent of the new woman, with her bicycle costume, railroad companies attempted to fasten a charge of contributory negligence on female passengers because their style of dress impeded their freedom of motion. No court, however, had the temerity to permit this attempt to succeed. In a case where a female passenger refrained from grasping a pendent strap in a street car because she could not conveniently reach it, and because to do so would have

[4] Georgia Railroad & Banking Co. v. Usry, 82 Ga. 54, 8 S. E. 186. Where a train does not stop at a station platform, but at a point 300 feet beyond, a female passenger is not guilty of contributory negligence, as matter of law, in obeying the conductor's command to jump to the ground, a distance of four feet, though she is five months advanced in pregnancy. Baltimore & O. R. Co. v. Leapley, 65 Md. 571, 4 Atl. 891. A female passenger about two months pregnant is not chargeable with contributory negligence in attempting, at a station where there is no platform, to board a train by stepping from the ground to the lower step of the car,—a distance of at least 30 inches. Missouri Pac. Ry. Co. v. Watson, 72 Tex. 631, 10 S. W. 731.

disarranged her dress, the supreme court of Pennsylvania said: "Are we to say, as matter of law, that women are to dress in a certain way, and that their ordinary habits, according to the usage of society, are to be cast aside when they enter a car, for fear they should find no seat? Clearly, these are facts which enter into the question of negligence, and form a part of that whole out of which the jury alone must draw the conclusion. Possibly, a woman may be so fantastically and foolishly hooped, wired, and pinned up as to deprive her of her natural power to help herself; but, if so, the question is one of fact, and not of law, and so we conclude to leave it, instead of imposing upon our brethern below the difficult duty of prying into the artificial stays of plaintiff's case." [5] So, it cannot be said, as matter of law, that a female passenger on a street car has no right to wear a hoop skirt,[6] or a dress so long as to trail behind her, and rest upon the platform as she is alighting.[7]

[5] West Philadelphia P. R. Co. v. Whipple (Pa.) 5 Wkly. Notes Cas. 68, affirming 11 Phila. 345.

[6] Colt v. Railroad Co., 33 N. Y. Super. Ct. 189, affirmed in 49 N. Y. 671.

[7] In Chartrand v. Railway Co., 57 Mo. App. 425, the court said: "It might be reasoned out to the satisfaction of some that a lady, in passing from a street car, is under the legal obligation to lift her dress in order to avoid an unnecessary and dangerous obstruction near the floor of the car; but we have been unable to find a case giving countenance to such a proposition, nor can we conceive upon what principle, either of law or common sense, a failure to do so would, for the reasons stated, be an act of negligence." In Patterson v. Railway Co., 12 Ohio Cir. Ct. 274, it was held that a woman alighting from a street car is not negligent in permitting her dress to trail

§ 183. PERSONS WITH DEFECTIVE REASONING FACULTIES—CHILDREN.

The law requires no greater degree of care from a child than might reasonably be expected from one of his years and experience.[1] In determining whether a boy acts with ordinary care, or is guilty of negligence, the jury must consider his conduct and action in view of his age. All that the law exacts of him is such prudence and discretion as is usually exercised by boys of his age.[2] But a boy must exercise care and prudence equal to his capacity, knowledge, and experience, even though thereby a higher degree of care is exacted of him than of boys of his own age generally.[3]

To children of tender years no contributory negli-

on the platform, unless she knows, or ought to know by the exercise of ordinary care, that there is danger in so doing.

§ 183. [1] Chicago & A. R. Co. v. Nelson, 153 Ill. 89, 38 N. E. 560. In Texas the broad doctrine has been laid down that a child that is a trespasser on the track or train of a railway company may recover damages for injuries sustained as the result of his voluntary conduct in placing himself in a position of peril, if he is so lacking in intelligence and discretion that he does not appreciate the consequences that are likely to result from his conduct, provided, of course, that the railroad company is guilty of negligence. Thompson v. Railway Co. (Tex. Civ. App.) 32 S. W. 191. In most states, however, the railroad company is under no obligation to exercise care towards trespassers. See post, c. 17.

[2] Philadelphia City Passenger Ry. Co. v. Hassard, 75 Pa. St. 367. At one time, however, it was held by an inferior court in New York that no distinction exists between adults and children in respect to what constitutes negligence. Solomon v. Railroad Co., 1 Sweeny, 298.

[3] Van Natta v. Power Co., 133 Mo. 13, 34 S. W. 505.

gence can be imputed.[4] Thus a child six years of age is not of sufficient discretion to be charged with contributory negligence in attempting to get off the platform of a slowly moving street car,[5] or in attempting to jump from a moving car, pursuant to the driver's orders.[6] But a seven year old boy is chargeable with the duty of exercising such degree of care as can reasonably be expected of one of his age, which, in view of all the circumstances, is properly for the jury.[7] So, a nine year old boy is not absolved from the exercise of all care. "While the law makes due allowance for the thoughtlessness and indiscretion of youth, it does not necessarily hold it irresponsible. A child must be very much younger than plaintiff to warrant the court in declaring, as a conclusion of law, that he is incapable of negligence. To the extent that a child has knowledge and understanding of a danger, or where it is of such a nature as to be obvious even to his years, he is under a legal duty to avoid it." [8] So whether the

[4] East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503; Erie City Pass. Ry. Co. v. Schuster, 113 Pa. St. 412, 6 Atl. 209 (four year old child).

[5] Buck v. Power Co., 46 Mo. App. 555.

[6] Bay Shore R. Co. v. Harris, 67 Ala. 6.

[7] Connolly v. Ice Co., 114 N. Y. 104, 21 N. E. 101. A seven year old boy, who is a passenger on a steamer, cannot be said to be negligent, as matter of law, in placing his foot on an exposed rudder chain. The jury is the judge as to whether or not the act was negligent in a child of that age. Garoni v. Compagnie Nationale De Navigation of Marseilles (Com. Pl.) 14 N. Y. Supp. 797, affirmed 131 N. Y. 614, 30 N. E. 865. A lad eight years of age is held to the exercise of that degree of care and discretion ordinarily to be expected of a child of that age. Sandford v. Railroad Co., 136 Pa. St. 84, 20 Atl. 799.

[8] Ridenhour v. Railway Co., 102 Mo. 270, 13 S. W. 889, and 14 S. W. 760. A nine year old boy, who has safely alighted from a moving

mind of a boy 10 years of age is sufficiently mature to make him responsible for his own contributory negligence is a question for the jury. It should not be decided by the court on demurrer to the petition.[9] So a boy 11 years old is not chargeable with contributory negligence, as matter of law, in riding on the steps of the front platform of a street car, but the question whether he could, by the exercise of that degree of care and diligence to be expected of a boy of his age, have avoided an injury to himself occasioned by the rapid driving of the car around a curve, is for the jury.[10]

street car, is not guilty of negligence, as matter of law, in running around the rear end of the car, and attempting to cross a parallel track, where he is struck by a car going in the opposite direction; but the question is for the jury. Dunn v. Railway Co., 21 Mo. App. 188. Where an injured child nine and one-half years old is before the jury as a witness, they should be left free to determine for themselves, from his appearance and his testimony, and the testimony of others on this subject, what his capacity was for exercising care for his own safety at the time he was injured, without being hampered by presumptions of law either for or against the competency of the child. Savannah, F. & W. Ry. Co. v. Smith, 93 Ga. 742, 21 S. E. 157.

[9] Avery v. Railway Co., 81 Tex. 243, 16 S. W. 1015. A 10 year old boy, in getting off a street car, need use only as much care, caution, and prudence as can be expected from one of his age. Brennan v. Railroad Co., 45 Conn. 284; Maher v. Railroad Co., 67 N. Y. 52, affirming 39 N. Y. Super. Ct. 155. A boy 10 years old is not guilty of contributory negligence, as matter of law, in arising from his seat, and following adult passengers to the platform, as the train is entering the station at his destination. Schreiner v. Railroad Co. (Sup.) 42 N. Y. Supp. 163.

[10] Wynn v. Railway, 91 Ga. 341, 17 S. E. 649. Whether or not a boy 11 years old is guilty of contributory negligence in jumping from a moving train as it passes the station platform, under the belief that he will be carried away if he does not do so, is a question of fact for the

But a 12 year old boy, of ordinary intelligence, living in the immediate vicinity of railroads, and accustomed to them, knows as well as an adult that the front of an engine, when reversed, between that and the cars, is not a safe place to ride when the train is moving. The fact that a boy of that age is more reckless and not as cautious as a man in the face of such danger is not, of itself, enough to excuse him; and in an action for his death, caused by a collision with another train, it is proper for the trial court to refuse to submit the question to the jury, and to rule on it as a question of law.[11] So, where, by law, a boy over 14 years of age is presumptively capable of committing

jury. Hemmingway v. Railway Co., 72 Wis. 42, 37 N. W. 804. So is the question whether a boy of that age is guilty of contributory negligence in obeying the conductor's order to get off the train while in motion. Benton v. Railroad Co., 55 Iowa, 496, 8 N. W. 330; or in voluntarily jumping from the engine while in motion after the train hands have thrown cold water on him. Branham v. Railroad, 78 Ga. 35, 1 S. E. 274.

[11] Ecliff v. Railway Co., 64 Mich. 196, 31 N. W. 180. But the court cannot say, as matter of law, that it is negligence for a 12 year old boy to walk along a station platform within a foot and a half of a train moving at the rate of two miles an hour. New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954, and 38 N. E. 871. A 12 year old boy, who has jumped on a projection in the rear of a street car, is not guilty of contributory negligence in jumping from the moving car, where the conductor came out and spit at him, and made a punch at his face. Hagerstrom v. Railroad Co., 67 Ill. App. 63. A 13 year old boy should be held to the exercise of that degree of care and diligence ordinarily to be expected of a child of his age,—neither more nor less. Crissey v. Railway Co., 75 Pa. St. 83. But it is negligence, as matter of law, for a bright, active boy, 13 years old, a trespasser on a train, who knew the attendant danger, to voluntarily attempt to jump from a train which is running 20 miles an hour. Howell v. Railroad Co. (Miss.) 21 South. 746.

crime, he is presumptively chargeable with diligence for his own safety against palpable and manifest peril, such as that of jumping from a railroad train in rapid motion. In the absence of any evidence of want of ordinary capacity in the particular boy, he should not be treated as a child of tender years, but as a young person who has passed that period, and become chargeable with such diligence as might fairly be expected of the class and condition to which he belongs.[12] So a 17 year old girl is not to be treated, with respect to the duty to take care of herself, as a child of tender years, but as a person who is presumptively chargeable with the exercise of ordinary discretion possessed by young persons of her class and condition.[13]

§ 184. SAME—INTOXICATED PERSONS.

In testing the question of negligence, the law recognizes no distinct class in favor of intoxicated persons. Drunk or sober, a man must exercise that degree of care which an ordinarily prudent and sober man would exercise. A man cannot voluntarily place himself in a condition whereby he loses such control of his brain and muscles as a man of ordinary prudence and caution, in the full possession of his faculties, would

[12] Central Railroad & Banking Co. v. Phillips, 91 Ga. 526, 17 S. E. 952; Georgia, C. & N. Ry. Co. v. Watkins, 97 Ga. 381, 24 S. E. 31. A 14 year old boy is not absolved from the exercise of care in boarding a moving street car, but he must exercise that care and caution which might be reasonably expected from one of his age, experience, and intelligence. Sly v. Railway Co. (Mo. Sup.) 36 S. W. 235.

[13] East Tennessee, V. & G. Ry. Co. v. Hughes, 92 Ga. 388, 17 S. E. 949.

exercise, and thereby contribute to an injury to himself, and then require of one ignorant of his condition recompense therefor.[1] Thus, though a train is so long that some of the cars stop on a bridge just beyond the station, the company is not liable for the death of an intoxicated passenger, who gets off on the bridge, and falls into a stream beneath, where the bridge is planked, and the distance from the track to the edge of the bridge is at least 14 feet.[2]

But an intoxicated man is not required to exercise a

§ 184. [1] Strand v. Railway Co., 67 Mich. 380, 34 N. W. 712. Hence, in an action for injuries to a passenger, caused by an alleged failure to give him a reasonable time to alight, where there is evidence that plaintiff had drunk more or less intoxicating liquor before taking passage, he cannot recover if the liquor interfered at all with his diligence in starting to leave the train, or lessened his caution and prudence in getting off. Id. The self-inflicted disability of intoxication will not excuse the passenger from the exercise of such care as is due from a sober man. Fisher v. Railroad Co. (W. Va.) 24 S. E. 570. Mere drunkenness which does not take away consciousness and the power to consider the danger to which one is exposed, nor deprive him of physical capacity to take care of himself and avoid danger, does not relieve him from the responsibility of exercising due care to escape the danger; and, if killed in consequence of such neglect of duty on his part, there can be no recovery on account of the injury. Louisville & N. R. Co. v. Johnson, 108 Ala. 62, 19 South. 51.

[2] Deselms v. Railroad Co., 149 Pa. St. 432, 24 Atl. 283. Where a drunken passenger steps from a ferryboat into the river, the fact of drunkenness is a defense. Davis v. Railroad Co., 8 Or. 172. In an action for injuries sustained by a passenger in being thrown from a street car, it appeared that plaintiff was drunk at the time of the accident; that, shortly before the accident, he was standing on the front platform, with his hands on the guard rails, and his body swaying back and forth. There was no evidence of any defect in the rails or roadbed. Held that, as matter of law, the intoxication contributed to the accident, and that plaintiff could not recover. Holland v. Railway Co., 155 Mass. 387, 29 N. E. 622.

greater degree of care than a sober man; and, if his conduct is characterized by a proper degree of care and prudence, his inebriety does not bar a recovery.[3] So, if an occasion arises, by reason of the carrier's negligence, when a prudent sober man could not, by the exercise of all ordinary diligence, protect himself, it would be of no consequence that a passenger injured by such negligence had by voluntary intoxication incapacitated himself for the exercise of ordinary diligence. The loss of capacity to do that which, if done, would be unavailing, could not rationally count for any excuse to the carrier, or be chargeable to the passenger as a reason why he should not have compensation for his injuries.[4] In other words, the mere fact of intoxication will not exonerate a carrier from liability for injuries to a passenger, unless such intoxication proximately contributed to the injury.[5]

[3] Chicago & N. W. Ry. Co. v. Drake, 33 Ill. App. 114. Drunkenness, in and of itself, is not contributory negligence, but it must appear that plaintiff did not exercise ordinary care, without reference to his inebriety. The question is whether plaintiff's conduct came up to the standard of ordinary care,—not whether or not he was drunk. Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269.

[4] Central Railroad & Banking Co. v. Phinazee, 93 Ga. 188, 21 S. E. 66.

[5] Meyer v. Railroad, 40 Mo. 151. The mere fact of intoxication is not sufficient to establish contributory negligence, but it bears on the probability or improbability that plaintiff was guilty of negligence which contributed to the injury which he sustained. Milliman v. Railroad Co., 66 N. Y. 642, affirming 4 Hun, 409. Intoxication of an injured person is not proof of negligence per se. Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201. If a passenger on a horse car is injured while intoxicated, this fact alone does not prevent his maintaining an action; but if his intoxication contributed to the injury in

§ 185. PERSONS IN POSITION OF PERIL.

"It is settled law that if one, by the negligence of another, has been placed in a situation of apparent imminent peril, he is not required, in attempting to escape therefrom, to use the judgment and discretion that is required of him when not dominated by terror of impending danger; and if, without having time to deliberate, and acting upon the instinct of self-preservation, and as a prudent person might be expected to act in the circumstances, he is injured by adopting a dangerous alternative, he may still recover from the one by whose negligence he has been impelled to act. This is true, though no injury would have resulted had no attempt to escape been made." [1] The leading case

any degree he cannot recover. Maguire v. Railroad Co., 115 Mass. 239; Holland v. Railway Co., 155 Mass. 387, 29 N. E. 622. The mere fact of intoxication will not defeat recovery for injuries sustained in being jerked, by a sudden motion of the train, from the car while alighting. Newton v. Railroad Co., 80 Hun, 491, 30 N. Y. Supp. 488. The mere fact of the intoxication of a passenger, who was drowned by falling through an unguarded opening on the wharfboat, where passengers were discharged from a steamer, does not, as matter of law, establish contributory negligence, but such intoxication is a fact from which the jury may infer contributory negligence. Buddenberg v. Transportation Co., 108 Mo. 394, 18 S. W. 970. The fact that a passenger standing on the running board of an open street car was intoxicated does not preclude recovery for injuries sustained in being negligently pushed off by the conductor, but it is a question for the jury whether the passenger was in the exercise of due care in standing on the running board while in an intoxicated condition. Kingston v. Railway Co. (Mich.) 70 N. W. 315.

§ 185. [1] Bischoff v. Railway Co., 121 Mo. 216, 25 S. W. 908; Kleiber v. Railway Co., 107 Mo. 240, 17 S. W. 946. See, also, Twomley v. Railroad Co., 69 N. Y. 158; Wilson v. Railroad Co., 26 Minn. 278,

on this subject is Jones v. Boyce,[2] decided in 1816. The action was for injuries to a passenger, who leaped from a stagecoach after the horses had become ungovernable. Lord Ellenborough said: "To entitle the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach. It is sufficient if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril. If that position was occasioned by the default of the defendant, the action may be supported." "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

Illustrations of this principle are quite numerous in passenger cases. Thus a passenger who leaps from a stagecoach to escape from a peril created by the negligence of the carrier or his servants is not chargeable with contributory negligence, though such attempt increased his peril, and though he would probably have sustained little or no injury if he had remained on the coach.[3] So a passenger who leaps from a train, either

3 N. W. 333; Linnehan v. Sampson, 126 Mass. 506; Haff v. Railway Co., 14 Fed. 558; Benner Livery & Undertaking Co. v. Busson, 58 Ill. App. 17.

2 1 Starkie, 493.

3 Stokes v. Saltonstall (1839) 13 Pet. 181; Ingalls v. Bills, 9 Metc. (Mass.) 1; Frink v. Potter, 17 Ill. 406; Lawrence v. Green, 70 Cal. 417, 11 Pac. 750. Where a passenger in a carriage is placed in imminent peril by the running away of the horses, and the driver calls on her to jump out, the question whether she is guilty of contributory negligence in doing so is for the jury. Budd v. Carriage Co., 25 Or. 314, 35 Pac. 660.

moving [4] or stationary,[5] to escape an impending collision, is not chargeable with negligence. The same rule applies to passengers on street cars.[6] So where a car has been derailed, and is bouncing along the ties at a rapid rate, a passenger is not chargeable with contributory negligence in jumping therefrom to escape the apparent danger.[7] So a passenger standing on a

[4] Buel v. Railroad Co., 31 N. Y. 314; South Western R. Co. v. Paulk, 24 Ga. 356.

[5] St. Louis, I. M. & S. Ry. v. Maddry, 57 Ark. 306, 21 S. W. 472; Iron R. Co. v. Mowery, 36 Ohio St. 418. Where a freight car runs down grade on a side track towards the main track, on which a passenger train is standing, and a cry, "Jump for your lives!" is raised by persons observing the runaway car, and the passenger train is suddenly started, a passenger is not chargeable with contributory negligence in leaping from the train to escape the apparently imminent collision; and the fact that the engineer succeeded in getting the passenger train out of the way of the freight car, and that the danger therefrom was not real, will not exonerate the carrier. St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 887. Where a passenger in the smoking compartment of a combination smoking and baggage car becomes apprehensive of a collision with a train which he knows is past due, and goes into the baggage car, with his hand on the knob of the door, prepared to jump, and does jump just before the trains collide, the fact of his being in the baggage car, in violation of the company's rules, does not, as matter of law, preclude a recovery; but the question whether he conducted himself as a person of ordinary prudence in going into the baggage car is one of fact for the jury. Cody v. Railroad Co., 151 Mass. 462, 24 N. E. 402.

[6] Imminent collision between street cars, South Covington & C. St. Ry. Co. v. Ware, 84 Ky. 267, 1 S. W. 493; Heath v. Railroad Co., 90 Hun, 560, 36 N. Y. Supp. 22; with train at railway crossing, Bischoff v. Railway Co., 121 Mo. 216, 25 S. W. 908; Holzab v. Railroad Co., 38 La. Ann. 185; Twomley v. Railroad Co., 69 N. Y. 158.

[7] Dimmitt v. Railroad Co., 40 Mo. App. 654; Pittsburgh, B. & W. R. Co. v. Rohrman (Pa. Sup.) 13 Wkly. Notes Cas. 258; Galena & C. U. R. Co. v. Yarwood, 15 Ill. 468, 17 Ill. 509; Wilson v. Railroad Co.,

platform awaiting the arrival of a train, having reason to believe, from the conduct of the servants of the railroad company and passengers standing there, that she is in imminent peril from the approach of a train in an unexpected direction, by reason of the misplacement of a switch through culpable negligence of the company's servants, is not, as matter of law, guilty of negligence in running away to escape the apprehended peril, and may recover for injuries sustained while so running.[8] Where a boy unfastens the brakes of a detached passenger car standing on a side track, and containing a number of passengers, and the car of its own momentum runs down the grade, a female passenger, alarmed at the rapid rate of speed, and by the absence of any person in charge of the car, is not guilty of contributory negligence, as matter of law, in jumping therefrom.[9] So a passenger on a river steamer which is in danger of capsizing by reason of unskillful management, and the cabins of which are already filled

26 Minn. 278, 3 N. W. 333. Where the horses drawing a street car are running away, and there is imminent danger that the car will be derailed, and thrown over an embankment, a passenger is not chargeable with contributory negligence in jumping therefrom. Dimmey v. Railroad Co., 27 W. Va. 32.

[8] Caswell v. Railroad Corp., 98 Mass. 194. Where an intending passenger, in passing over the railway tracks on a level crossing, sees a train approaching, and endeavors to jump across the track onto the opposite platform, in order to escape the train, and is caught between it and the platform, and sustains injuries, the question whether he is guilty of contributory negligence is for the jury, though he would not have been injured had he remained where he was when he first saw the train. Wright v. Railway Co., 8 L. R. Ir. 257.

[9] Western Maryland R. Co. v. Herold, 74 Md. 510, 22 Atl. 323.

with water, is not guilty of contributory negligence in leaping overboard.[10]

On the other hand, failure to make an attempt to escape from impending peril is not negligence, if plaintiff is so confused and stupefied by the danger that he has lost control of his faculties.[11] So, where the brakes on a detached baggage and express car become loose, and the car starts down a descending grade, the question whether the express messenger is guilty of contributory negligence in remaining on the car, and endeavoring to reset the brakes, instead of jumping therefrom while it is still moving slowly, is for the jury.[12] So a passenger who has fallen while attempting to alight from a street car, and who has caught hold of the railing to save himself, is not guilty of negligence, as matter of law, in retaining his hold, and being dragged some distance, instead of releasing his hold.[13]

§ 186. SAME—DEFENDANT MUST BE GUILTY OF NEGLIGENCE.

To warrant a recovery for injuries sustained in an attempt to escape from an impending peril, it must appear that the peril was caused by defendant's negligence.[1] This proposition is illustrated by the case of Chicago, R. I. & P. Ry. Co. v. Felton.[2] A passenger

[10] Ladd v. Foster, 31 Fed. 827.

[11] Walter v. Railroad Co., 39 Iowa, 33.

[12] Union Pac. Ry. Co. v. Kelley, 4 Colo. App. 325, 35 Pac. 923.

[13] Knowlton v. Railway Co., 59 Wis. 278, 18 N. W. 17.

§ 186. [1] Bischoff v. Railway Co., 121 Mo. 216, 225, 25 S. W. 908.

[2] 125 Ill. 458, 17 N. E. 765.

train was stalled in a snow bank in the nighttime. Some of the passengers in the rear of the train observed the headlight of an engine coming towards them, apparently on the same track, but in reality on another track. The whistle on the passenger train was sounded several times, and some of the passengers, including plaintiff's intestate, became alarmed, left the train, and were struck, on a parallel track, by the approaching engine and snowplow. It was held that the railroad company was not liable, because it had not been guilty of any negligence. So the fact that a passenger on a street car may not have been guilty of any negligence in jumping from it, under the belief that a collision with a train on an intersecting crossing was imminent, will not render the street-railway company liable, if it was in fact not guilty of any negligence in the matter.[3] So, where a num-

[3] Dallas Consolidated Traction Ry. Co. v. Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925; Kleiber v. Railway Co., 107 Mo. 240, 17 S. W. 946. Where a passenger on a street car is brought into apparent imminent danger from a collision at a railroad crossing by the negligence of the motorman in attempting to cross when he could see that there was a probability of the engine reaching there first, she can recover for injuries received in an attempt to flee from the car, though she would have been uninjured if she had kept her seat; but if the car would not have been brought into such danger, except for the sudden, unexpected, and unanticipated obstruction of the car by a wagon, then there would be no liability on the part of the company. Shankenbery v. Railway Co., 46 Fed. 177. A watchman stationed at a crossing of a street railroad with an ordinary steam railroad is guilty of negligence in permitting the driver of a street car to drive on the railroad track, and in then closing the gate while the horses are on the track, with a locomotive approaching, and in then ordering the driver to go on, implying that a desperate alternative of trying to cross the track should be made; and the railroad com-

ber of little girls get on a train which is being switched on a side track, the company is not responsible for injuries sustained by them in jumping from the train because of a panic created by an unfounded belief that they were about to be carried to a distant city.[4] So a false alarm by a stranger or a fellow passenger, of an approaching train, does not authorize a passenger to leap from his stationary train to the ground, a distance of 10 feet, without looking to see whether there is any danger from the approaching train, which had been flagged, and was stopped about 100 yards from the passenger train.[5] But the conduct of a brakeman in quickly leaving his seat on a signal from the locomotive whistle, and hurriedly setting a brake, and in crying out in a loud voice, "For

pany is therefore liable for injuries to a passenger on a street car, who jumped therefrom to avoid the impending collision. Kleiber v. Railway Co., 107 Mo. 240, 17 S. W. 946.

[4] Reary v. Railway Co., 40 La. Ann. 32, 3 South. 390. A railroad company is not liable for an injury resulting from a passenger's grasping the hand rail of a moving car, on evidence that he was so confused, standing between the moving train and stationary cars on a parallel track, that his act was involuntary, where such position was taken by him without necessity, and without fault of the railroad company. French v. Railway Co., 89 Mich. 537, 50 N. W. 914. Some of the machinery of a locomotive engine broke, and water and steam issued from the engine. It entered the carriage in which plaintiff was riding. Some one cried out that the train was on fire, and plaintiff became alarmed, and jumped from the carriage, sustaining injuries. Held, that there was no negligence or default on defendant's part, and hence that the principle that a passenger placed by the misconduct of the carrier in a position of peril may adopt the alternative of a dangerous leap or remain at his peril had no application. Kearney v. Railroad Co., 18 L. R. Ir. 303.

[5] Gulf, C. & S. F. Ry. Co. v. Wallen, 65 Tex. 568.

God's sake, jump!" is extraordinary, and not in the usual performance of his duties; and if there is nothing in the situation, or its appearance, to justify such conduct, it is negligence, if it is calculated to disconcert the passengers, and induce them to believe, as ordinarily prudent people, that danger is imminent.[6]

§ 187. SAME—APPREHENSION OF DANGER MUST BE REASONABLE.

On the one hand, the injured person is entitled to act on the appearance, and not the reality, of the danger; but, on the other hand, the appearance of danger must be such as is calculated to alarm a person of reasonable prudence. If the appearance of danger is not of this character, the injuries sustained in attempting to escape are to be attributed to plaintiff's own rashness and imprudence. Thus, a jury is warranted in finding that the falling of lumber against a caboose from the car ahead is not sufficient to alarm a reasonably prudent man, so as to cause him to leap from the train moving at full speed, and that a passenger who does so is guilty of contributory negligence.[1]

But it should be borne in mind that, on occasions where a passenger is suddenly confronted by imminent danger and peril, he cannot reasonably be expected to calculate chances, or to deliberate upon the means of escape, but must, of necessity, judge hastily of remaining where he is, as also of the danger of attempting to

[6] Ephland v. Railway Co., 57 Mo. App. 147. As to authority of servant in warning against peril, see post, § 363.

§ 187. [1] Woolery v. Railway Co., 107 Ind. 381, 8 N. E. 226.

escape, by the circumstances as they at the instant appear to him, and not by the result. He acts upon the probabilities as they appear to him; and if he acts as a man of ordinary prudence, placed in the same circumstances, and under a like necessity of immediate action and decision, would have acted, and in so doing makes an effort to escape, and is injured, the railroad company is responsible to him for his damages.[2] Thus where a collision between a street car and a locomotive on an intersecting track is apparently imminent, and the car and horses are inclosed between the gates across the railroad track, and all is confusion, excitement, and terror, a passenger is not chargeable with negligence in jumping from the street car, though the locomotive is under the complete control of the engineer, is barely moving, and no actual danger of collision exists.[3] So where a brakeman in the lookout of a caboose, on a signal for brakes to stop the train, excitedly calls to passengers in the caboose, "Jump! jump for your lives!" a passenger who knows there is a train on the track ahead, and another behind his train, is not chargeable with contributory negligence in leaping from the moving train, without stopping to investigate, although there is no danger from any

[2] St. Louis & S. F. Ry. Co. v. Murray, 55 Ark. 248, 18 S. W. 50. In this case it was held that where a train is permitted to remain standing on the track in the nighttime, a passenger in the rear coach, who sees another train approaching from the rear on the same track, is justified in acting on the appearance of danger, and in leaving the car, though the employés on the rear train were on the lookout for the passenger train, and were able to stop the rear train, and did stop it, without a collision.

[3] Kleiber v. Railway Co., 107 Mo. 240, 17 S. W. 946.

source.[4] Of course, the right to escape from an impending peril is not restricted to cases where one's life is in danger, but extends to cases of apparent peril of severe bodily injuries.[5]

§ 188. SAME—AVOIDING INCONVENIENCE.

As a general rule, a passenger is not justified in running into danger of life or limb to avoid some inconvenience to which he has been subjected by the carrier; but if the inconvenience is very great, and the danger run in avoiding it very slight, it may not be unreasonable to incur that danger.[1] Thus, we have seen that the inconvenience in being carried beyond a passenger's station does not authorize him to put his life in peril by leaping from a rapidly moving train.[2] But a passenger who, on a dark night, starts to leave the train without delay, and finds it in motion when she gets on the car steps, is in a position of sudden danger, and cannot be held responsible for a mistake in

[4] McPeak v. Railway Co., 128 Mo. 617, 30 S. W. 170. Where a brakeman negligently gives a false alarm of danger, and calls out in a loud voice, "Jump for your lives!" the question whether a passenger acted under a reasonable apprehension of danger must be determined by the circumstances as they appeared to him. And it is error to submit to the jury the additional fact that an alarm whistle was sounded, which the passenger did not hear. Ephland v. Railway Co., 57 Mo. App. 147.

[5] La Prelle v. Fordyce, 4 Tex. Civ. App. 391, 23 S. W. 453.

§ 188. [1] Adams v. Railway Co., L. R. 4 C. P. 739. See, also, Siner v. Railway Co., L. R. 3 Exch. 150; Gee v. Railway Co., L. R. 8 Q. B. 161.

[2] Ante, § 151. See, also, Railroad Co. v. Aspell, 23 Pa. St. 147; Lake Shore & M. S. Ry. Co. v. Bangs, 47 Mich. 470, 11 N. W. 276.

judgment in stepping from the car without any conscious effort on her part to do so.[3] So a passenger on a street car who is put in peril of falling off by the starting of the car while attempting to alight, is not guilty of contributory negligence in jumping from the car, if a person of ordinary prudence might have done the same thing.[4]

In an English case it was held that, though a door to a railway carriage flies open as the result of the company's negligence, yet, where the inconvenience suffered by the passenger from the open door would be slight, and the peril incurred in an attempt to shut it considerable, an injury sustained in falling from the carriage while making the attempt cannot be consid-

[3] Leggett v. Railroad Co., 143 Pa. St. 39, 21 Atl. 996. A female passenger who is on the steps of a car, with an infant in her arms, about to alight, when the car starts, and who thus has the perilous alternative presented to her either to remain there, and run the risk of being thrown from the train as it accelerates its motion, or to step from the train before it increases its motion, is not chargeable with contributory negligence in stepping from the car. Odom v. Railroad Co., 45 La. Ann. 1201, 14 South. 734. Where a train starts while a passenger, with his wife and children, is in the act of alighting, and the wife, with an infant in her arms, is thrown to the ground, the husband's act in jumping off to her assistance, and leaving his other children of tender years on the car platform, and the act of one of such children in attempting to jump off after her parents, do not bar recovery for injuries to the child. The acts of both the father and the child were the direct consequences of defendant's own misconduct, and fall within the well-settled rule that contributory negligence cannot be set up as a defense when such negligence is the result of tremor and excitement produced by defendant's misconduct, or when the latter puts the plaintiff to a sudden election between the course which he took, or submitting to a grave inconvenience. Lehman v. Railroad Co., 37 La. Ann. 705.

[4] Piper v. Railway Co., 52 Minn. 269, 53 N. W. 1060.

ered as the immediate consequence of defendant's negligence.[5] In an American case, however, it was held that where a railroad company fails to furnish any lights while a train is passing through a tunnel, requiring six or seven minutes' time, and leaves the car door open, so that smoke and cinders enter in great quantities, to the inconvenience of passengers, one who sits near the door is not guilty of negligence, as matter of law, in making a careful attempt to shut the door.[6] So where a passenger car overshoots the station platform, and the alternative is presented to a female passenger either of jumping to the ground,—a distance of three or four feet,—or to descend by stepping on the bumper or connecting link at the rear of the car, the question whether she was guilty of contributory negligence in choosing the latter alternative, during which her foot was crushed by a movement of the train, is for the jury.[7]

[5] Adams v. Railway Co., L. R. 4 C. P. 739.

[6] Western Maryland R. Co. v. Stanley, 61 Md. 266.

[7] Johnson v. Railroad Co., 11 Minn. 296 (Gil. 204). Where the train overshoots the station platform, and no intention is manifested by the train hands to back the train, and the alternative is presented to a female passenger of getting out where the carriage is, or of being carried on to the next station, her action in getting out is not such an assumption of the risk as will prevent recovery for injuries sustained in so doing, where the danger is not actual or obvious, and the descent is only awkward and difficult, and she uses due care. Nicholls v. Railway Co., Ir. R. 7 C. L. 40.

CHAPTER XII.

CONTRIBUTORY NEGLIGENCE (Continued)—PROXIMATE CAUSE.

§ 189. Plaintiff's Negligence must be a Proximate Cause of Injury.
190. Defendant's Negligence after Discovery of Plaintiff's Peril.

§ 189. PLAINTIFF'S NEGLIGENCE MUST BE A PROXIMATE CAUSE OF INJURY.

Contributory negligence does not defeat a recovery unless it is a proximate cause of the injury.

It is a well-settled principle of law that where a man negligently, and without excuse, places himself in a position of known danger, and thereby suffers an injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injury sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened. The true test is found in the affirmative of the question, did the plaintiff's negligence directly contribute in any degree to the production of the injury complained of? If it did, then there can be no recovery; if it did not, it is not to be considered.[1] Thus a passenger's negli-

§ 189. [1] Lehigh Val. R. Co. v. Greiner, 113 Pa. St. 600, 604, 6 Atl. 246. In Thompson v. Duncan, 76 Ala. 334, it was held that negligence of plaintiff which contributes "in any way" to the injury does not in all cases bar a recovery. It must contribute proximately to the injury. In Dougherty v. Railroad Co., 97 Mo. 647, 11 S. W. 251,

gence in riding on the platform of a moving train [2] or of a street car [3] does not affect his right to recover for an injury suffered in properly alighting after the car has stopped, or in being struck by the train after he has gotten off.[4] So, where a passenger has establish-

the following instruction was condemned as inconsistent with itself, and as abolishing the doctrine of contributory negligence: Negligence on the part of the plaintiff will not defeat a recovery if it did not contribute or cause the injury, or if the injury would not have happened but for defendant's negligence, notwithstanding plaintiff's negligence. In some of the cases it is intimated that plaintiff's negligence will not bar a recovery if it did not contribute to the accident, as distinguished from the injury. Thirteenth & F. St. P. Ry. Co. v. Boudrou, 92 Pa. St. 475. It is hardly necessary to say that this view is entirely untenable. Plaintiff's negligence which proximately contributes to the injury bars recovery. Otherwise, a man riding on the cowcatcher of a locomotive might recover for injuries sustained in a collision with another train, on the ground that his presence on the cowcatcher did not contribute to the collision.

[2] Wood v. Railway Co., 49 Mich. 370, 13 N. W. 779; Van Horn v. Railroad Co., 38 N. J. Law, 133.

[3] Omaha H. Ry. Co. v. Doolittle, 7 Neb. 481; Lax v. Railroad Co., 46 N. Y. Super. Ct. 448.

[4] Gadsden & A. U. Ry. Co. v. Causler, 97 Ala. 235, 12 South. 439. Even if it be negligence for a passenger to ride on the rear platform of a street car, such negligence cannot be considered as the proximate cause of an injury resulting from being struck by a pole of a following car. Thirteenth & F. St. P. Ry. Co. v. Boudrou, 92 Pa. St. 475. Riding on the platform of a street car is not the proximate cause of a passenger's death, who was struck by a derrick, against the guy rope of which the car was negligently driven. Hunt v. Railroad Co., 14 Mo. App. 160. In this case the court said: "It is claimed that if the passenger had been seated within the car, instead of standing on the rear platform, he would not have been struck by the fatal derrick. If this be good reasoning, then every unfortunate who was ever blown up in a steamboat explosion was guilty of contributory negligence in going on the boat, or in being within reach of the boiler. Had he stayed on shore, or had he occupied some other part of the

ed himself safely on the car steps, his negligence in boarding the train while in motion is not the proximate cause of injuries sustained in being pushed or pulled therefrom by one of the company's employés.[5] So the act of a passenger in boarding a moving train is not, as matter of law, the proximate cause of an injury, where the train gave a sudden jerk after he had gotten on the car platform, and he was thrown off.[6] The act of a passenger in leaving an elevated train before it reaches the station, on the invitation of the conductor, even if it is negligent, is not the proximate cause of an injury resulting from the train's starting up while there are 50 such passengers on the track, who became panic stricken, and, in their fright, crowded each other off the track, causing some to fall to the

boat, he might have been safe." Where a passenger is injured in an attempt to escape from a street car, the horses on which have become frightened or ungovernable, and pulled the car off the track, the fact that she was riding on the front platform cannot be said to be the proximate cause of the accident, so as to bar a recovery on the ground of contributory negligence. Noble v. Railroad Co., 98 Mich. 249, 57 N. W. 126.

[5] Sharrer v. Paxson, 171 Pa. St. 26, 33 Atl. 120; Harrold v. Railway Co., 47 Minn. 17, 49 N. W. 389; Pennsylvania R. Co. v. Reed, 9 C. C. A. 216, 60 Fed. 694, affirming 56 Fed. 184. The getting on board of a moving train is not the proximate cause of an injury sustained in being forced from the train by water thrown in such person's face by one of the train hands. Clark v. Railroad Co., 40 Hun, 605. The wrongful act of a boy in boarding a moving train, with the intention of stealing a ride, is not the proximate cause of an injury sustained in being ejected from the moving train after his entry had become an accomplished fact. Kline v. Railroad Co., 37 Cal. 400.

[6] Distler v. Railroad Co., 151 N. Y. 424, 45 N. E. 937, reversing 78 Hun, 252, 28 N. Y. Supp. 865.

pavement beneath.[7] So the mere fact that a passenger on a street car alights when the car stops before making a street crossing, instead of waiting until it has reached the place at which passengers usually alight, is not the proximate cause of an injury sustained by her dress catching in a projecting bolt of the car.[8] So the unlawful act of the owner of a freight car in persuading the company's employés to attach it to a passenger train, in violation of the company's rules, is not the proximate cause of an injury to the owner resulting from a collision of the train with an animal on the track.[9] So the fact that a train was delayed 25 minutes at its starting point, to enable a drover to load his cattle, is not such contributory negligence on the part of the drover as will prevent his

[7] Weiler v. Railway Co., 53 Hun, 372, 6 N. Y. Supp. 320, affirmed in 127 N. Y. 669, 28 N. E. 255. Leaving a moving train is not the proximate cause of an injury sustained in being struck by another train while crossing a parallel track. Van Ostran v. Railroad Co., 35 Hun, 596.

[8] North Chicago St. R. Co. v. Eldridge, 151 Ill. 542, 38 N. E. 246.

[9] Lackawanna & B. R. Co. v. Chenewith, 52 Pa. St. 382. The court said: "It has been suggested that, if the car had not been attached, the plaintiff would not have been injured. Doubtless this is true, and it is true of every injury. In all cases, if the party injured had been absent, it is presumable he would not have been injured by the agency operating. The voluntary presence of the traveler, if not wrongful, is so much a matter of individual choice that its propriety is never an element to be inquired into in claiming or resisting damages for injury. People have a right to travel when they please, and will be compensated for injuries if occasioned by the negligence of those engaged in transporting them, if they have not contributed to the immediate disaster by their own negligence, whatever might be said against the propriety of their journeying."

recovering for injuries sustained in a collision, while on the journey, with another freight train, which overtook the one on which he was riding.[10]

One of the tests by which to determine whether plaintiff's negligence is a proximate cause of his injury is this: If defendant's negligence would have caused the injury if plaintiff had been in no wise negligent, then the fact that he was negligent will not defeat a recovery. "It is now well settled that a passenger on a railroad train, who is injured by the negligence of the railroad company, is not debarred from a right to a recovery because he was, at the time of receiving the injury, negligently riding on the platform of a car, or in some other exposed or dangerous position, if such action on his part did not contribute in any degree to the accident or his injury. If the accident which occasioned the injury would have happened, and would have been attended with the same results to the passenger, if he had been in his proper place on the train, then his negligence is not contributory negligence, in a sense that would preclude recovery, because it in no

[10] Flinn v. Railroad Co., 1 Houst. (Del.) 469, 503. "It was entirely optional with the company's servants whether they detained the train or left at the regular and appointed time; and if they chose to wait till the plaintiff's stock was put on board, it was their own voluntary act, and they cannot, by reason of it, exempt themselves from the liability which would have rested upon them had they made their departure at the regular and appointed time." The fact that a passenger is suffering from rheumatism will not preclude a recovery for injuries sustained in a collision with another train. Even if it be conceded that an infirm passenger is guilty of contributory negligence in going on a journey, such negligence is not the proximate cause of the injury. Shenandoah Val. R. Co. v. Moose, 83 Va. 827, 3 S. E. 796.

manner or degree contributed to the injury, and is therefore wanting in the element of proximate cause essential to constitute contributory negligence that will bar a recovery." [11] So, where the smoking compartment of a combination smoking and baggage car is crowded with passengers, a passenger, unable to obtain a seat, who goes into the baggage compartment, with permission of defendant's employés, is not guilty of contributory negligence which defeats a recovery for injuries sustained in a rear-end collision, though a rule of the company, of which he is ignorant, prohibits passengers from riding in the baggage compartment.[12] So the negligence of a passenger in permitting his arm to slightly protrude out of the window is not the proximate cause of an injury which would have happened had his arm been entirely inside.[13]

[11] Kansas & A. V. Ry. Co. v. White, 14 C. C. A. 483, 67 Fed. 481.

[12] New York, L. E. & W. R. Co. v. Ball, 53 N. J. Law, 283, 21 Atl. 1052. See, also, ante, § 171.

[13] Carrico v. Railway Co., 39 W. Va. 86, 19 S. E. 571. In the following cases plaintiff's negligence was held the proximate cause of his injuries: A railroad company carried a passenger beyond his destination, and put him off at one end of a trestle, and his gun at the other end. He crossed to get the gun, and got his feet muddy when he stepped from the trestle to the embankment. In recrossing the trestle, his foot slipped by reason of this mud, and he was injured. Held, that the proximate cause of his injury was his own negligence in attempting to cross the bridge with his muddy boots, and the company was not liable. International & G. N. R. Co. v. Folliard, 66 Tex. 603, 1 S. W. 624. A fire broke out in a passenger car through the negligence of the company's servants. Plaintiff, a passenger, after having tried from that car to signal the engineer to stop, and having failed because the bell rope did not work, went into the smoking car for that purpose. There he notified the conductor of the ac-

§ 190. DEFENDANT'S NEGLIGENCE AFTER DISCOVERY OF PLAINTIFF'S PERIL.

Contributory negligence does not bar a recovery, if defendant, after becoming aware of plaintiff's danger, fails to exercise due care, in the circumstances, to avoid harm.

In the circumstances above stated, the contributory negligence of the injured person is not the proximate cause of the injury, but the negligence of defendant, being the later negligence, is the sole proximate cause. As has been said by one of the text writers on this subject: "The party who has a last clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible." [1] The rule may also be upheld on another ground: A failure to exercise ordinary care by a defendant in such circumstances amounts to a degree of reckless conduct that may well be termed willful and wanton; and when an act is done willfully and wantonly, con-

cident, and then went back to the burning car to get his valise. He was prevented from getting out of that car by the fire, and was severely burned. Held, that his voluntary act of returning to the burning car was the proximate cause of his injuries, and prevented recovery, as matter of law. Hay v. Railway Co., 37 U. C. Q. B. 456. Where the defense is that plaintiff jumped from a moving train, it is error to instruct that, if his negligence was not the proximate cause of his injuries, he could recover, since, if he was injured by jumping from the moving train, his act was the immediate cause of his injury, and hence there was no question of proximate cause in the case. Gulf, C. & S. F. Ry. Co. v. Rowland (Tex. Sup.) 38 S. W. 756.

§ 190. [1] Shear. & R. Neg. § 99.

tributory negligence on the part of the person injured is not an element which will defeat a recovery.[2]

The pioneer case on this subject is the famous "donkey case" of Davies v. Mann.[3] There plaintiff had negligently turned his donkey loose on a highway, with his forefeet fettered, and it was run over in broad daylight by defendant's wagon, driven at an improper rate of speed. Plaintiff recovered, notwithstanding his antecedent negligence, since defendant's driver, by proper care, could have avoided the accident. This case has been uniformly followed in the English courts,[4] though it has been the subject of considerable, if not always wise, criticism by American text writers. The principle is, however, fully recognized by the American courts, and has often been applied in the decision of passenger cases.[5] Thus, though a person may be

[2] Esrey v. Pacific Co., 103 Cal. 541, 37 Pac. 500; Id., 88 Cal. 399, 26 Pac. 211.

[3] (1842) 10 Mees. & W. 546.

[4] In Tuff v. Warman (1858) 5 C. B. (N. S.) 573, 585, it was said: "Mere negligence or want of ordinary care and caution would not, however, disentitle plaintiff to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequence of the neglect or carelessness of the plaintiff." In Radley v. Railway Co., 1 App. Cas. 754, it is said: "Though plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident which is the subject of the action, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

[5] "The rule is that contributory negligence on the part of plaintiff will not disentitle plaintiff to recover, if it appears that defendant might, by the exercise of reasonable care and prudence, have avoided

guilty of contributory negligence in attempting to board a street car moving at full speed, yet where he is dragged some 160 feet before the car is stopped, he may recover for the injuries thereby sustained, if the driver could have avoided the injury by the exercise of reasonable care in stopping the car after he was notified that plaintiff had fallen and was being dragged by the car.[6] So, the negligence of a passenger in

the consequences of plaintiff's negligence. That rule is but a statement, in another form, of the proposition that antecedent misconduct or negligence on the part of the plaintiff, such as could not have had any influence upon the conduct of defendant, will not defeat recovery for injuries inflicted by the immediate negligence of defendant. It is a misuse of terms to speak of such negligence as contributory negligence." Pennsylvania R. Co. v. Reed, 9 C. C. A. 219, 60 Fed. 694. See, also, Carrico v. Railroad Co., 35 W. Va. 389, 14 S. E. 12.

[6] Woodward v. Railway Co., 71 Wis. 625, 38 N. W. 347. A similar case, decided the same way, is Chicago W. D. Ry. Co. v. Hughes, 69 Ill. 170. Though a plaintiff may be guilty of negligence in attempting to board a slowly moving train at a station at which it has not been brought to a full stop, or in holding onto the railing of the steps, and keeping pace with the train, yet, if the danger might have been avoided by due care on the part of defendant's employés after they discovered the peril, or if the injury would not have been inflicted but for their affirmative act in negligently increasing the speed of the train, knowing that thereby plaintiff's safety would be imperiled, as they must be holden to have known, the company is liable, notwithstanding plaintiff's own original negligence. Montgomery & E. R. Co. v. Stewart, 91 Ala. 421, 8 South. 708. Where a conductor agrees to slack up a train to enable a passenger to get off, and in reliance on such promise the passenger steps from the train, but retains his hold on the car when he finds that the train is moving too rapidly, in the hope that the speed will be lessened, and the conductor discovers him in this situation, and increases the speed, the company is liable for the injuries sustained in a fall to the ground. Central R. Co. v. Smith, 69 Ga. 368. The contributory negligence of a passenger in standing dangerously near the track at a station, at a point where

stepping or falling from the platform of a rear car will not preclude recovery for his death, caused by being struck by another train while lying helpless on the track, where the employés of the first train had notice that a passenger had fallen therefrom, but did not stop to remove him from the track, or notify the second train by telegraph of the fact, or adopt any precaution to avoid injuring him.[7] So it has been held that contributory negligence of a passenger on a street car in protruding his arm beyond the exterior surface of the car will not defeat recovery for injuries received in striking a bridge, where the conductor, on seeing the passenger's perilous position, failed to warn him of the danger.[8]

the only avenue of escape is across the track, is no defense where the direct cause of the accident is the omission of the employés of an approaching train, after becoming aware of the passenger's danger, to use a proper degree of care to avoid the consequences thereof; as by warning him of the train's approach, or stopping the train. Little Rock & Ft. S. Ry. Co. v. Cavenesse, 48 Ark. 106, 2 S. W. 595.

[7] Railroad Co. v. Kassen, 49 Ohio St. 230, 31 N. E. 282. Where a passenger on a river steamer falls overboard, the failure of the boat to stop to pick him up after the officers know that he has fallen overboard is such negligence as will render the carrier liable for his death by drowning, though his own negligence contributed to his falling overboard. Melhado v. Transportation Co., 27 Hun, 99. A passenger, having hailed a street car, proceeded across a parallel track, and, as he was about to get on board, was run over in broad daylight by a car on a parallel track, which was more than 300 feet away when he started to cross the track. Held, that the failure of the driver to stop the car, after becoming aware of plaintiff's perilous position, was the proximate cause of the accident, and that therefore plaintiff's contributory negligence did not bar a recovery. Forwood v. City of Toronto, 22 Ont. 351.

[8] South Covington & C. St. Ry. Co. v. McCleave (Ky.) 38 S. W. 1055.

But the rule is properly applied only in those cases where plaintiff's negligence was the remote, and not the proximate, cause of the injury; that is, where the negligent acts of the parties were independent of each other, the act of the person injured preceding that of defendant. This principle cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury comes to one or both of them.[9] Hence the failure of a railroad engineer to sound the alarm whistle on seeing a person near the track does not render the company liable for his death, where he stepped on the track a few feet in front of the engine, without looking or listening for the approach of the train, since the deceased himself could have prevented the accident by the exercise of ordinary care.[10] So the rule does not apply to the case of a passenger riding on the locomotive against the rules of the company, who was injured in a collision with another train, though the employés of the train on which he was riding knew of his position.[11]

Of course, no liability attaches to defendant if, after discovering plaintiff's peril, he exercises due care to avoid the injury. Thus, where a person negligently steps backward on a street-car track, 10 or 15 feet in front of an approaching cable car, the employés of the cable company are not guilty of negligence after discovering plaintiff's peril, if they make an effort in good

[9] Holmes v. Railway Co., 97 Cal. 161, 31 Pac. 884.

[10] Id.

[11] Downey v. Railway Co., 28 W. Va. 732.

faith to stop the car, and actually stop it within one foot of the point of collision with plaintiff.[12]

Another question that arises in this connection is this: Must defendant actually have discovered the peril to which plaintiff has exposed himself by his own negligence, or is it sufficient that defendant ought to have discovered it by the exercise of reasonable care? As a general proposition, it would seem that defendant ought to have actual knowledge of plaintiff's danger, since no one is bound to anticipate another's negligence.[13] Thus, where a passenger negligently places his finger in the jamb of an open door, a brakeman is not chargeable with negligence in closing the door without ascertaining the dangerous position of plaintiff's finger, though it would be otherwise if he had known this fact. "If it had been the duty of the brakeman to see that the plaintiff was taking proper care of himself, the fact that he should have discovered the danger would have been material. But such was not

12 Bailey v. Railway Co., 110 Cal. 320, 42 Pac. 914. Where a passenger riding on the driving bar of a street car falls off backward, and the driver makes every effort to rescue the falling man, and stops his car as soon as he can, the rule that a defendant, after discovering plaintiff's peril, caused by his own negligence, is bound to exercise due care to avoid injuring him, is fully satisfied. Downey v. Hendrie, 46 Mich. 498, 9 N. W. 828.

13 Plaintiff in an action for personal injuries, who seeks to escape the consequences of his own negligence upon the ground that the injury complained of was caused by the recklessness and willful negligence of defendant, must show that defendant had actual knowledge of plaintiff's danger, and could, by the exercise of ordinary care and prudence, have avoided the resulting injury. Richmond & D. R. Co. v. Didzoneit, 1 App. D. C. 482. See, also, Hololian v. Railroad Co., 8 Mackey (D. C.) 316.

the brakeman's duty. He had the right to presume that the plaintiff was conducting himself with prudence, and it was not his duty to see that such was the fact." [14] Circumstances, however, may exist where defendant will be held liable, on the ground that he ought to have discovered plaintiff's peril by the exercise of reasonable care, though he did not in fact know it. A passenger who was compelled to ride on the front platform of a crowded street car was asked by the driver to assist in getting the car back on the track. After doing so, he attempted to get back on the platform by climbing over a railing three feet high; and, while he was doing so, the driver started the car without signal or warning, and the passenger was thrown under the car. It was held that, though he might have been guilty of negligence, yet it was a question for the jury whether, in the exercise of proper care, the driver might have seen plaintiff's dangerous position, and thereby have avoided the injury.[15]

[14] Texas & P. Ry. Co. v. Overall, 82 Tex. 247, 18 S. W. 142. A train approaching a flag station at night was signaled by a bystander, but it did not come to a stop until it had passed the station platform by about 200 feet. An intending passenger ran along the track to reach the train, and was run over by it while backing towards the station; he having been unable to notice its movement on account of the darkness. Held that, in the absence of evidence that the trainmen had reason to believe the passenger to be on the track, there was no room for the application of the rule that his contributory negligence in running along the track would be no defense if the train hands, by the exercise of reasonable care, could have avoided running over him. St. Louis & S. F. R. Co. v. Whittle, 20 C. C. A. 196, 74 Fed. 296.

[15] People's Passenger Ry. Co. v. Green, 56 Md. 84. The court said: "In answer to this, it may be said there was no obligation upon the driver to look after, or to exercise any care and prudence in regard to,

persons attempting to board the car by the front platform, because such persons had no right to enter the car in that direction. Ordinarily, this would be true; but, under the circumstances of this case, taking into consideration that plaintiff had paid his fare, and that, owing to the crowded condition of the car, he was obliged to stand on the front platform; that he had gotten off, at the request of the driver, to help in getting the car again on the track,—in view of these and other facts of this case, there was an obligation on the part of the driver to see that plaintiff and others had an opportunity to get on the car before he started the horses; and if he saw, or by the exercise of proper care might have seen, the position of the plaintiff, and thereby have avoided the injury, we think the company was liable." In Texas & P. Ry. Co. v. Nolan, 11 C. C. A. 202, 62 Fed. 352, it was said that defendant would be liable if he was guilty of negligence after he might have discovered plaintiff's peril by the exercise of reasonable care; but it was held that where a passenger, on leaving a train in the night, crosses a railroad track, and is struck by a moving car, the brakeman on which was unable to see him, it is error to charge the rule as to defendant's negligence after discovering plaintiff's peril.

CHAPTER XIII.

CONTRIBUTORY NEGLIGENCE (Continued)—VARIATIONS FROM COMMON-LAW RULE.

§ 191. Admiralty Rule.
192. Comparative Negligence.
193. Rule in Tennessee.
194. Rule in Georgia and Florida.
195. Rule in Nebraska.

§ 191. ADMIRALTY RULE.

Courts of admiralty are not bound by the common-law rule governing contributory negligence, but, in cases of mutual fault, they may apportion damages between the parties according to the principles of equity and justice. This rule applies to marine torts resulting in personal injuries, as well as to cases of prize and collision.

The doctrine of an equal division of damages in the case of collision between vessels, where both are guilty of fault, has long prevailed in England. It was said by Sir William Scott in The Woodrop-Sims,[1] decided in 1815, that, if a loss occurs through a collision between two vessels, where both parties are to blame, the rule of law is "that the loss must be apportioned between them, as having been occasioned by the fault of both of them." This rule was approved by the house of

§ 191. [1] 2 Dod. 83, 85.

lords in 1824.[2] With us the rule was first established by the supreme court of the United States in the case of The Catharine v. Dickinson,[3] and has been followed in numerous cases since.

The rule is apparently derived from early medieval codes or customs, and seems to have been founded upon the difficulty of determining, in such cases, the degree of negligence in the one and the other of the parties. It is said by Cleirac[4] that such rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, when they cannot discover the motives of the parties, or when they see faults on both sides.

As to whether the rule applies to personal injuries sustained by reason of marine torts, there has been a conflict of opinion in the lower courts of the United States.[5] But the question was settled in favor of the application of the admiralty rule to such cases by the supreme court of the United States in 1890, in The Max Morris.[6] In that case the court said: "Contributory negligence, in a case like the present, should not wholly bar recovery. There could have been no in-

[2] Hay v. Le Neve, 2 Shaw, App. 395.

[3] 17 How. 170.

[4] Us et Coutumes de la Mer, p. 68, quoted in The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29.

[5] It was held that it did not, and that libelant's contributory negligence barred recovery, in Peterson v. The Chandos, 4 Fed. 615, 619; Holmes v. Railway Co., 5 Fed. 523, 538; The Manhasset, 19 Fed. 430. Contra, The Explorer, 20 Fed. 135; The Wanderer, Id. 140; The Truro, 31 Fed. 158; The Eddystone, 33 Fed. 925; Olson v. Flavel, 34 Fed. 477; McCord v. The Tiber, 6 Biss. 409, Fed. Cas. No. 8,715.

[6] 137 U. S. 1, 11 Sup. Ct. 29, affirming 21 Fed. 860, and 28 Fed. 881.

jury to the libelant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the district judge in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libelant in a case like the present, where their fault is clear, provided the libelant's fault, though evident, is neither willful nor gross nor inexcusable, and where the other circumstances present a strong case for relief. We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libelant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the vessel, does not debar him entirely from recovery."

§ 192. COMPARATIVE NEGLIGENCE.

Negligence of an injured person does not defeat recovery, if he was only slightly negligent, and the other party was grossly negligent, as compared with each other. This doctrine, though generally repudiated elsewhere, pre-

vailed for many years in Illinois, but now, by force of recent decisions, it is obsolete even in that state.

The history of the rise and fall of the doctrine of comparative negligence shows most strikingly that unsound legal principles cannot stand the test of everyday use during a long period of time. At an early day, the courts of Illinois adopted the common-law principle that want of ordinary care by plaintiff, which proximately contributes to his injury, bars recovery. The doctrine of comparative negligence originated with Justice Breese in the case of Galena & C. U. R. Co. v. Jacobs,[1] decided in 1858, and was stated by him as follows: "The degrees of negligence must be measured and considered; and, wherever it shall appear that plaintiff's negligence is comparatively slight, and that of defendant gross, he shall not be deprived of his action." He did not profess to find express authority for this rule in prior adjudications, but he thought he discovered a "vein of it very perceptible, running through very many" of what he considered the leading cases, English and American, on the subject of contributory negligence. The doctrine was announced in numerous other cases, and finally it became the established law in Illinois.[2]

§ 192. [1] 20 Ill. 478.

[2] Chicago & A. R. Co. v. Gretzner, 46 Ill. 75; Chicago & N. W. Ry. Co. v. Sweeney, 52 Ill. 325. In Toledo W. & W. Ry. Co. v. McGinnis, 71 Ill. 346, Judge Walker said: "The settled rule of law in this court on the question of negligence is that, though a plaintiff may be guilty of negligence which may have contributed to the injury, he may still recover if his negligence is slight, and that of defendant

Exactly what the supreme court meant by the term "slightly negligent" was one of the puzzles for the legal profession in Illinois while the doctrine prevailed. Probably the court at an early day intended to establish a rule that would aid an injured party to recover, in case he had not come quite up to the standard of ordinary care, but nearly so, where he could prove the other party was grossly negligent, in comparison with his slight failure.[3] But one of the remarkable things about the doctrine of comparative negligence was that the court was never required to ascertain the exact relation between the doctrine of comparative negligence and the common-law doctrine of contributory negligence until the case of Stratton v. Railway Co.[4] arose in 1880. In that case the trial court charged that "it was an essential element to the right of action that plaintiff showed he was in the exercise of ordinary care." This instruction was held erroneous, as ignoring the rule of comparative negligence. The question came again before the supreme

gross, as compared with that of plaintiff. The rule is, no doubt, a modification of the language of the earlier decisions of this court, although not a material modification of the common-law principle. Where courts state the rule differently, they hold that, where the negligence of the plaintiff is slight, and that of the defendant gross, the plaintiff's negligence did not contribute materially to the injury." The rule is also asserted in the following, among other, cases: Chicago & A. R. Co. v. Mock, 72 Ill. 141; Illinois Cent. R. Co. v. Hammer, Id. 347; Chicago & N. W. Ry. Co. v. Coss, 73 Ill. 394; Indianapolis & St. L. R. Co. v. Evans, 88 Ill. 63; Chicago & A. R. Co. v. Bonifield, 104 Ill. 223; City of Mt. Carmel v. Guthridge, 52 Ill. App. 632.

[3] City of Galesburg v. Benedict, 22 Ill. App. 111.

[4] 95 Ill. 25.

court in Chicago, B. & Q. R. Co. v. Johnson,[5] when it reversed itself. In that case the trial court gave the following instruction: "If the jury believe from the evidence that plaintiff did not exercise ordinary care, yet that his negligence was slight, and that the negligence of defendant was gross, in comparison with each other, then the plaintiff must recover." This was emphatically held to be erroneous, because a person guilty of want of ordinary care could not be guilty of merely "slight negligence." This principle was reaffirmed in Calumet Iron & Steel Co. v. Martin.[6] In that case defendant's counsel contended that whenever plaintiff was guilty of slight negligence, he must show that defendant was guilty of gross negligence before he could recover. But the supreme court laid down this principle: "If plaintiff is in the use of ordinary care, and defendant not in the use of ordinary care, and injury happens in consequence, plaintiff can recover without proof that defendant's negligence was gross in comparison to the plaintiff's negligence, which was slight, even if plaintiff was guilty of slight negligence." These two decisions completely stripped the principle of comparative negligence of its vitality, though the force and effect of the decisions were not at once apprehended by the supreme court itself.[7] At length, in the case of City of Galesburg v. Benedict,[8] decided in 1886 by one of the appellate courts of Illinois, Mr.

[5] 103 Ill. 512 (1882).

[6] 115 Ill. 358, 3 N. E. 456 (1885).

[7] In Willard v. Swansen, 126 Ill. 381, 18 N. E. 548, the doctrine of comparative negligence was reiterated in a modified form.

[8] 22 Ill. App. 111.

Justice Lacey, in a remarkably clear and lucid opinion, reviewing the entire history of the law of comparative negligence, as expounded in that state, pointed out the fact that it was virtually abolished by these two decisions. "In all cases plaintiff is bound to show ordinary care on his part, and lack of ordinary care on defendant's part. This entitles him to recover if the injury was caused by such negligence of the defendant. Now, admitting that plaintiff, while in the exercise of ordinary care, was slightly negligent, which he may be under the rule in the Johnson Case, supra, what benefit would this comparative negligence doctrine be to him, he having a complete right to recover without it? Why should he desire to prove, in excuse of his slight negligence, that defendant was grossly negligent in comparison, especially as the defendant cannot take advantage of the fact that he does not prove it?" Finally, the supreme court itself announced the abolition of the doctrine in unmistakable terms. In Lake Shore & M. S. Ry. Co. v. Hessions,[9] it said: "We have repeatedly held, in effect, in the later decisions, beginning with Calumet Iron & Steel Co. v. Martin,[10] that the doctrine of comparative negligence, as announced in the earlier cases, was no longer the law of this state, and it is no longer to be considered as a correct rule of law applicable to cases of this character. The doctrine as announced in the later decisions, as applied to this class of cases, requires, as a condition to recov-

[9] 150 Ill. 546, 556, 37 N. E. 905, citing Pullman Palace-Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285; Village of Mansfield v. Moore, 124 Ill. 133, 16 N. E. 246.

[10] 115 Ill. 358, 3 N. E. 456.

ery by the plaintiff, that the person injured be found to be in the exercise of ordinary care for his own safety, and that the injury resulted from the negligence of the defendant." In numerous other cases, the doctrine of comparative negligence is declared to be obsolete in Illinois.[11] The doctrine never obtained much of a foothold elsewhere, though traces of it are to be found in some decisions.[12]

§ 193. RULE IN TENNESSEE.

The doctrine of comparative negligence has been emphatically repudiated in Tennessee.[1] Nevertheless, a modification of the common-law rule as to contribu-

11 City of Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892; Wenona Coal Co. v. Holmquist, 152 Ill. 581, 38 N. E. 946; North Chicago St. R. Co. v. Eldridge, 151 Ill. 542, 548, 38 N. E. 246; Cleveland, C., C. & St. L. R. Co. v. Maxwell, 59 Ill. App. 673; Illinois Cent. R. Co. v. Ashline, 56 Ill. App. 475; Chicago & E. I. R. Co. v. Johnson, 61 Ill. App. 465.

12 The doctrine of comparative negligence, recognized in the courts of Illinois, and, in a modified form, of Georgia and Tennessee, is not the law of this state. McDonald v. International & G. N. Ry. Co., 86 Tex. 1, 22 S. W. 939; Gulf, C. & S. F. Ry. Co. v. Buford, 2 Tex. Civ. App. 115, 21 S. W. 272; Missouri, K. & T. Ry. Co. v. Rodgers (Tex. Sup.) 36 S. W. 243, reversing 35 S. W. 412; Atchison, T. & S. F. R. Co. v. O'Melia, 1 Kan. App. 544, 41 Pac. 437; Atchison, T. & S. F. R. Co. v. Henry (Kan. Sup.) 45 Pac. 576. But in Kentucky Cent. Ry. Co. v. Smith, 93 Ky. 449, 20 S. W. 392, it was held that where a railroad company is guilty of the highest degree of neglect, resulting in the injury of a person crossing its tracks at a public crossing in a city, the fact that the person injured was guilty of ordinary negligence constitutes no defense to the company.

§ 193. 1 Railway Co. v. Hull, 88 Tenn. 33, 12 S. W. 419; East Tennessee, V. & G. R. Co. v. Gurley, 12 Lea (Tenn.) 55; East Tennessee, V. & G. R. Co. v. Fain, Id. 35.

tory negligence obtains. The Tennessee rule is thus stated by the supreme court of that state:[2] "Where both parties are guilty of some negligence, if the negligence of the plaintiff is the proximate and efficient cause of the accident, he cannot recover, and if the defendant's negligence is the proximate and efficient cause of the injury, it is liable; but in such case the negligence of the plaintiff should be taken into consideration by the jury in mitigation of damages." In a still later case[3] the rule is thus stated: "Plaintiff's contributory negligence or wrongful conduct may be considered in mitigation of damages, however wanton, willful, and reckless the act of the defendant which produced the injury may have been." The principal difference between the Tennessee and the common-law rule is in allowing damages to be mitigated by the conduct of the injured party.[4] To the extent that it

[2] East Tennessee, V. & G. R. Co. v. Conner, 15 Lea (Tenn.) 254, citing Whirley v. Whiteman, 1 Head (Tenn.) 610. In the case first cited the facts were these: A station was announced, the train was stopped, and the conductor told a female passenger to get off. She hurried to the door, but the train had started when she got on the car platform. In the darkness and confusion, seeing that the train was moving off, she jumped and was injured. As a matter of fact, the train had not arrived at the station. Held, that she had a right to assume that the train had arrived at the station, and to rely on the conductor's direction, and that she was entitled to recover against the company, but that her conduct in leaping from the moving train should be considered by the jury in mitigation of damages.

[3] Railway Co. v. Wallace, 90 Tenn. 53, 15 S. W. 921.

[4] Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128. In this case it was held that, in an action for wrongful ejection of a passenger from a train, plaintiff's negligence in failing to make a thorough search for his ticket could be considered by the jury in mitigation of damages.

permits mitigation of damages for willful wrong, the Tennessee rule is more onerous than the common law, for at common law contributory negligence is no defense in an action for a willful wrong.

§ 194. RULE IN GEORGIA AND FLORIDA.

By statute [1] adopted in Georgia originally in 1855, it is enacted: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." Another statute [2] declares: "If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury received." Still another statute [3] raises a presumption of negligence against a railroad company from the fact of the accident. In Vickers v. Atlanta & W. P. R. Co.,[4] Justice Bleckley said, in reference to these statutes:

§ 194. [1] Code Ga. 1882, § 3034. A similar statute has recently been enacted in Florida. Rev. St. Fla. 1892, § 2345.

[2] Code Ga. 1882, § 2972.

[3] Code Ga. 1882, § 3033.

[4] (1879) 64 Ga. 306. In this case it was held that it was for the jury to determine whether a boy 10 years old, who is injured in an attempt to board a moving engine on invitation of the engineer, is entitled to recover from the company.

"We discover that a presumption of negligence is raised against the company from the mere fact of inflicting the injury, and that, on combining that presumption with the whole run of the evidence, one of four results may follow: First, if the presumption is wholly overcome, the verdict should be for the company; secondly, whether it is overcome or not, if the plaintiff either caused the injury by his own negligence, or could, by ordinary care, have avoided it, the verdict should be for the company; thirdly, if the plaintiff was faultless, neither contributing to the injury, nor omitting ordinary care to avoid it, the verdict should be against the company for full damages; and, fourthly, if the plaintiff contributed to the injury, but did not himself cause it, and could not have avoided it by ordinary care, the verdict should be against the company, not for full damages, but for the damages diminished in proportion to the default attributable to the plaintiff." In a later case [5] it is said: "It seems to be the clear meaning

[5] Americus, P. & L. R. Co. v. Luckie, 87 Ga. 6, 13 S. E. 105. In Macon & W. R. Co. v. Johnson (1868) 38 Ga. 409, it is said: "If a passenger on a railroad be injured by a collision of trains, and the evidence shows that, though the company or its agents were guilty of negligence, yet the injured party could, by the exercise of ordinary diligence, have avoided the consequences to himself of that negligence, he is not entitled to recover any damages from the company. If, in such case, it appears that both parties were guilty of negligence, and it does not further appear from the evidence that deceased could, at the time of the injury, have avoided the consequences to himself of the negligence of the railroad company or its agents, he is entitled to recover; but it is the duty of the jury to lessen the amount of their verdict in proportion to the negligence and want of ordinary care of the passenger." In Western & A. R. R. v. Wilson, 71 Ga. 22, it was held that, where a boy attempts to board a moving train on the

of our law that the plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows he could, by ordinary care, after the negligence of defendant began, or was existing, have avoided the consequences to himself of that negligence. Of course, there can be no recovery when the defendant is entirely free from negligence, and uses all proper care to prevent injury. The law of contributory negligence is applicable only where both parties are at fault, and when, also, the plaintiff could not, by ordinary care, have avoided the injury which defendant's negligence produced."

§ 195. RULE IN NEBRASKA.

A statute in Nebraska renders railroad companies insurers of the safety of their passengers, except when the injury arises from the criminal carelessness of the passenger, or a violation of the company's rules of which the passenger had notice.[1] This statute, by its terms, is restricted to railroad companies as carriers of passengers. In all other cases, the common-law rule as to contributory negligence prevails. The term "criminal negligence," as used in this statute, is "defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard of the passenger's own safety, and amount

invitation of one of the train hands, both parties are at fault; and a verdict of $4,500 for the loss of a leg by reason of the attempt will not be set aside under the statute.

§ 195. [1] Comp. St. Neb. 1893, c. 72, art. 1, § 3. See, also, ante, § 27.

to a willful indifference to the injury liable to follow." [2] To jump from the car platform, without using the steps, as the train is pulling out of the station,[3] or to leap from a rapidly moving train, without any direction from the trainmen, and not under the fear of impending danger,[4] is criminal negligence, within the meaning of this statute. So a passenger who attempts to alight from a train standing on a high bridge, after he has been warned by the conductor not to do so, and been informed of the situation of the train, is guilty of criminal negligence, as matter of law.[5] But it is not criminal negligence, as matter of law, for a passenger to attempt to leave a train moving about as fast as a person can walk.[6]

[2] Omaha & R. V. R. Co. v. Chollette, 33 Neb. 143, 49 N. W. 1114; Chicago, B. & Q. R. Co. v. Hague, 48 Neb. 97, 66 N. W. 1000; Chicago, B. & Q. R. Co. v. Hyatt (Neb.) 67 N. W. 8.

[3] Chicago, B. & Q. R. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976; Id., 39 Neb. 803, 58 N. W. 434.

[4] Woolsey v. Railroad Co., 39 Neb. 798, 58 N. W. 444.

[5] Chicago, B. & Q. R. Co. v. Hague, 48 Neb. 97, 66 N. W. 1000.

[6] Chicago, B. & Q. R. Co. v. Hyatt (Neb.) 67 N. W. 8.

CHAPTER XIV.

NEGLIGENCE OF THIRD PERSONS—IMPUTED NEGLIGENCE.

§ 196. Concurrent Negligence of Third Persons.
197. Imputed Negligence.
198. Same—Of Carrier or Driver to Passenger.
199. Same—Of Parent to Child.
200. Same—Of Husband to Wife.
201. Same—Of Wife to Husband.

§ 196. CONCURRENT NEGLIGENCE OF THIRD PERSONS.

A carrier is not relieved from liability for the consequences of its own negligence by the fact that the negligence of a third person also concurred in producing the injury to the passenger.[1]

The principle heretofore stated, that a carrier is not responsible for the wrongful acts of third persons,[2] has no application unless it itself is free from negligence contributing to the injury.[3] Hence, in cases of collision between trains of different companies, it is no defense to the carrier to say that the other company was negligent, if its own negligence proximately contributed to the injury.[4] So, where the life of a

§ 196. [1] Louisville, N. A. & C. Ry. Co. v. Lucas, 119 Ind. 591, 21 N. E. 968.

[2] See ante, § 96.

[3] Clark v. Railroad Co., 127 Mo. 197, 29 S. W. 1013.

[4] Union R. & T. Co. v. Shacklet, 119 Ill. 232, 10 N. E. 896; Clark v. Railroad Co., 127 Mo. 197, 29 S. W. 1013; Eaton v. Railroad Co., 11

passenger on a steamer is lost by the defective construction of the hurricane deck, which gives way, and precipitates him into the water, the fact that the improper conduct of a crowd in haste to board the boat contributed to the accident does not relieve the steamboat owner from liability.[5]

Allen, 500. A street-railroad company is liable for an injury to a passenger in its car sustained in a collision with the car of another company, at an intersection of the tracks of the two companies, if the negligence of its own servants contributed to the injury, though the servants of the other were also negligent. Barrett v. Railroad Co., 45 N. Y. 628, affirming 1 Sweeny, 568. Where a passenger on a street car is injured in a collision between the car and a fire truck, the fact that the collision was caused by the joint negligence of the street-car driver and those in charge of the truck does not relieve the street-car company from liability for the injury. Heucke v. Railway Co., 69 Wis. 401, 34 N. W. 243. A ship owner is liable to a passenger on his vessel for injuries sustained in a collision caused by the concurring negligence of the colliding ships. Jung v. Starin, 12 Misc. Rep. 362, 33 N. Y. Supp. 650. See, also, ante, §§ 88–91.

[5] Com. v. Coburn, 132 Mass. 555. The gate on a ferryboat was out of order, the lock at the top being removed, and the catch at the bottom being out of working order. Some unauthorized person opened the gate as the boat approached the landing, and a passenger was pressed against it by a sudden movement of the crowd. Held, that it was defendant's duty to see that the gate was properly locked and guarded, and that therefore the act of a stranger in throwing open the gate did not relieve it from liability. Peverly v. City of Boston, 136 Mass. 366. Where a carrier of passengers by a steamer is negligent in failing to keep a boat properly suspended over a part of the deck where it is proper for passengers to be, and a passenger is injured by the fall of the boat, the fact that other passengers carelessly got into the boat, and that their negligence contributed to bring about the accident, is no defense. Simmons v. Steamboat Co., 97 Mass. 361. Where a passenger about to disembark from a river steamer is injured because the stage plank, owing to the current of the river, comes in contact with a temporary stanchion defectively constructed by the carrier, the fact that the stage plank may have been put out

But a railroad company is not liable for an injury to a passenger caused by the collision of its train with an engine of another railroad at a grade crossing of the two roads, where the collision was caused solely by the negligence of the employés of the other railroad.[6]

On the principle that there can be no contribution between joint wrongdoers, a carrier against whom a judgment has been rendered for injuries to a passenger cannot recover its amount, either in whole or in part, from a third person, whose negligence concurred with that of the carrier in producing the accident.[7]

by passengers, instead of the crew, does not relieve defendant from liability. Louisville & J. Ferry Co. v. Nolan, 135 Ind. 60, 34 N. E. 710.

[6] Bunting v. Railroad Co., 118 Pa. St. 204, 12 Atl. 448.

[7] Talmadge v. Railroad Co., 11 Ohio, 197. This rule, however, is not applicable in exceptional cases. A passenger, on leaving the station of a railroad company, was injured by stumbling over some mail bags negligently left there by a mail contractor engaged in transferring them from the station to the post office. The railroad company was held liable to the passenger because it had failed to keep the sidewalk reasonably safe. Held, that the company could recover against the contractor; that such action was grounded on the fact that the mail contractor, by his negligence, had exposed the company to liability; and that the company's neglect to keep the sidewalk safe did not make it a joint wrongdoer with the contractor in any such sense as to prevent it from recovering. Old Colony R. Co. v. Slavens, 148 Mass. 363, 19 N. E. 372. In an action against two railroad companies for personal injuries, it is within the power of the court to render judgment over against the company whose negligence caused the injury. Gulf, C. & S. F. Ry. Co. v. Hathaway, 75 Tex. 557, 12 S. W. 999. At common law, a judgment for damages against joint wrongdoers could not be severed; but a statute in Kentucky, passed in 1839, authorizing the jury to assess several judgments against joint defendants in such cases, is still in force, and under it the jury may

§ 197. IMPUTED NEGLIGENCE.

In considering the question whether a passenger injured by the concurring negligence of the carrier and a third person may recover against the third person as well as the carrier, it becomes necessary to notice the doctrine of imputed negligence. In certain relations the negligence of a third person will be imputed to plaintiff. Thus, where the negligence of plaintiff's servant, while prosecuting plaintiff's business, concurs with that of defendant in producing an injury to plaintiff, the negligence of the servant will be imputed to plaintiff, and will bar a recovery to the same extent as if plaintiff had been guilty of contributory negligence.[1] Sound legal principle would seem to require that this doctrine be strictly limited to cases where the person whose negligence is sought to be imputed to plaintiff stands in such relation to him as will make him liable to strangers for the negligence of such person.[2] Efforts have, however, been made by courts to press the doctrine beyond these limits, but the tendency of recent decisions is decidedly adverse to this course. In the language of the supreme court of Georgia in a recent case:[3] "It would seem that the efforts on the part of the courts of an earlier day to formulate rules which would extend the

assess heavier damages against one defendant than against the other. Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578, 6 S. W. 441.

§ 197. [1] La Riviere v. Pemberton, 46 Minn. 5, 7, 48 N. W. 406.

[2] 2 Jagg. Torts, p. 980.

[3] Atlanta & C. Air-Line Ry. Co. v. Gravitt, 93 Ga. 369, 389, 20 S. E. 550.

doctrine of imputable negligence so as to include persons other than those who actually sustained towards each other the relation of master and servant, or principal and agent, or who were jointly engaged in the prosecution of a common enterprise, have proved to be entirely unsuccessful legal ventures. Such rules have already met the fate which must inevitably sooner or later have befallen them, for they stand upon no foundation of logic, wisdom, or justice."

§ 198. SAME—OF CARRIER OR DRIVER TO PASSENGER.

Negligence of a carrier or of the driver of a public conveyance cannot be imputed to a passenger riding in the vehicle, so as to prevent him from recovering against a third person whose negligence concurred with that of the driver or carrier in producing injury to the passenger. By the weight of authority, the same principle applies to persons riding in a private vehicle at the invitation of the owner or driver.

In Thorogood v. Bryan,[1] decided in 1849, it was held that a passenger, by taking his seat in a public conveyance, becomes so far identified with the driver that the negligence of the driver is imputable to him, and prevents recovery against a third person whose negligence concurred with that of the driver in producing an injury to the passenger. The principle announced in

§ 198. [1] 8 C. B. 115.

this case stood as the law of England for 40 years.[2] It was finally overruled by the house of lords in 1888, in the case of The Bernina,[3] where it was held that a passenger on a vessel is not so identified with the master and crew as to prevent the maintenance of an action against another vessel for his death, caused by a collision between the two vessels resulting from the combined negligence of both. In that case Lord Watson said: "I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant. He does not look to them for orders, and they have no right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong or inconsistent with their safety. Practically, they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine driver."

In the United States the current of authority has always been adverse to Thorogood v. Bryan. In the language of the supreme court of Louisiana:[4] "It is so unjust to attribute to a passenger the negligence of the agents of the company in whose carriage he is riding, so untrue in point of fact that any identity exists be-

[2] The case was followed in Armstrong v. Railway Co. (1875) L. R. 10 Exch. 47.

[3] 13 App. Cas. 1.

[4] Holzab v. Railroad Co., 38 La. Ann. 185.

tween them, and so true that it can exist only by a sort of legal fiction, that it is not surprising that there has been a judicial revolt against the doctrine." The principle of Thorogood v. Bryan was repudiated at an early day by the court of appeals of New York,[5] and now it is held without dissent by all courts in the United States that the negligence of a carrier cannot be imputed to a passenger, so as to bar a recovery by the passenger against a third person whose negligence concurred with that of the carrier in causing an injury to the passenger.[6] "The public interests will be best

[5] Chapman v. Railroad Co., 19 N. Y. 341; Colegrove v. Railroad Co., 20 N. Y. 492, affirming 6 Duer, 382; Webster v. Railroad Co., 38 N. Y. 260.

[6] Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. 1165; West Chicago St. R. Co. v. Piper (Ill.) 46 N. E. 186, affirming 64 Ill. App. 605; Pittsburgh, C. & St. L. R. Co. v. Spencer, 98 Ind. 186; McDonald v. Railroad Co., 47 La. Ann. 1440, 17 South. 873; Patterson v. Railway Co., 54 Mich. 91, 19 N. W. 761; Malmsten v. Railroad Co., 49 Mich. 94, 13 N. W. 373; Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32; Flaherty v. Railway Co., 39 Minn. 328, 40 N. W. 160; Transfer Co. v. Kelly, 36 Ohio St. 86; Markham v. Houston Direct Nav. Co., 73 Tex. 247, 11 S. W. 131; New York, P. & N. R. Co. v. Cooper, 85 Va. 939, 9 S. E. 321. The doctrine of Thorogood v. Bryan, 8 C. B. 115, which imputes to a passenger the negligence of a driver over whom the passenger exercises no influence or control, so far as it has obtained a footing in this state, is overruled. State v. Railroad Co., 80 Me. 430, 15 Atl. 36, overruling Dickey v. Telegraph Co., 43 Me. 492. The contributory negligence of a driver of a public or private vehicle, not owned or controlled by the passenger, who is himself without fault, will not constitute a bar to the right of the passenger to recover against the railroad company for injuries received by a collision of its train with the vehicle. Philadelphia, W. & B. R. Co. v. Hoagland, 66 Md. 149, 7 Atl. 105. In Pennsylvania it was at one time held that, where a passenger is injured by the concurring negligence of the carrier and a third person, the negligence of the carrier will be imputed to the

subserved by adhering strictly to the long and well established principle that, where one has received an actionable injury at the hands of two or more wrongdoers, all, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff in such case has election to sue all jointly, or he may bring his separate action

passenger, and the latter cannot recover against the third person, but he may recover against the carrier. Lockhart v. Lichtenthaler (1863) 46 Pa. St. 151. "I would say that the reason for the rule is that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances, as an incentive to care and diligence. * * * It would be altogether more just to hold liable him who has engaged to observe the highest degree of diligence and care, and has been compensated for so doing, rather than him upon whom no such obligation rests, and who, not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party who might be injured." This case was followed in Philadelphia & R. R. Co. v. Boyer, 97 Pa. St. 91. But these cases and the English cases were criticised in Dean v. Railroad Co., 129 Pa. St. 520, 18 Atl. 718, and were overruled in Bunting v. Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34. In this last case it was said: "If a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, there is no reason, founded in public policy or otherwise, which would release one of them, and hold the other. It is true, the carrier may be subjected to a higher degree of care than his co-tort feasor; but this affords no reason why either or both of them should not be held to that degree of care, respectively, which the law imposes upon them, and to be answerable in damages accordingly. The general rule undoubtedly is, if a person suffers injury from the joint negligence of two parties, and both are negligent in a manner which contributes to the injury, they are liable jointly and severally, and it would seem in principle to be a matter of no consequence that one of them is a common carrier. Neither the comparative degree of care required, nor the comparative degree of culpability established, can affect the liability of either."

against each or any one of the wrongdoers. To sanction a departure from this fundamental principle in the law of torts would create an anomaly in the law, not demanded by justice, convenience, or public policy." [7] This principle is not confined to passengers on ordinary railroad trains, but extends to passengers on street cars; and it is quite generally held that, where a passenger on a street car is injured in a collision with a railroad train at a crossing, the fact that the employés of the street-car company were negligent does not relieve the railroad company from liability for its negligence.[8] So, a passenger on a stagecoach is not chargeable with the negligence of the driver, so as to preclude recovery against a third person, whose negligence concurred with that of the driver in producing the injury.[9] So, one who hires a public hack, and gives the driver

[7] Wabash, St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364.

[8] Georgia Pac. Ry. Co. v. Hughes, 87 Ala. 610, 6 South. 413; Railway Co. v. Harrell, 58 Ark. 454, 25 S. W. 117, disapproving Duggins v. Watson, 15 Ark. 118; Louisville, C. & L. R. Co. v. Case's Adm'r, 9 Bush, 728, 735; Stewart's Case, 2 Metc. (Ky.) 119; Kuttner v. Railway Co., 29 Mo. App. 502; Bennett v. Transportation Co., 36 N. J. Law, 225; McCallum v. Railroad Co., 38 Hun (N. Y.) 569; O'Toole v. Railroad, 158 Pa. St. 99, 27 Atl. 737; Downey v. Traction Co., 161 Pa. St. 588, 29 Atl. 128, 14 Pa. Co. Ct. R. 251; Gulf, C. & S. F. Ry. Co. v. Pendry, 87 Tex. 553, 29 S. W. 1038; Whelan v. Railroad Co., 38 Fed. 15; Woolley v. Railroad Co., 8 Mackey, 542. It was at one time held in New York that a passenger in a horse car is chargeable with the negligence of the driver, and cannot recover against a steam-railroad company for injuries caused by the concurring negligence of its servants and of the street-car driver. Mooney v. Railroad Co., 5 Rob. (N. Y.) 548. But this is no longer the law.

[9] Becke v. Railway Co., 102 Mo. 544, 13 S. W. 1053. In New York it was held at one time that the negligence of the driver of a stage coach will be imputed to the passenger. Brown v. Railroad, 32 N. Y.

directions as to the place he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver.[10]

On the question whether the negligence of the driver of a private vehicle can be imputed to his invited guest riding with him, there is a conflict of authority in the United States. But the decided weight of authority is in favor of the proposition that the negligence of the driver or owner of a private vehicle is not imputable to another person riding by invitation in the vehicle, unless that person had some right, or was under some duty, to control or influence the driver's conduct.[11] Such right might arise by reason of the

597. But this case must be taken to be overruled by Robinson v. Railroad Co., 66 N. Y. 11.

[10] Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391. This case was referred to in The Bernina, 13 App. Cas. 1, 10, as follows: "That was a decision by the supreme court of the United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect." The same principle is announced in the following cases: Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 316; East Tennessee, V. & G. Ry. Co. v. Markens, 88 Ga. 60, 13 S. E. 855; Perez v. Railroad Co., 47 La. Ann. 1391, 17 South. 869; Randolph v. O'Riordon, 155 Mass. 331, 29 N. E. 583; New York, L. E. & W. R. Co. v. Steinbrenner, 47 N. J. Law, 161.

[11] Elyton Land Co. v. Mingea, 89 Ala. 521, 7 South. 666; Pittsburgh, C. & St. L. R. Co. v. Spencer, 98 Ind. 186; Town of Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452; City of Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Lake Shore & M. S. Ry. Co. v. McIntosh, 140 Ind. 261, 272, 38 N. E. 476; Lake Shore & M. S. Ry. Co.

two being engaged at the time in a joint enterprise for their common benefit; and if this were not so, the duty might arise from obvious or known incompetency of the driver, resulting from drunkenness or other cause.[12] So, the negligence of a servant, to whom the master has committed the control of the

v. Boyts (Ind. App.) 43 N. E. 667; Lake Shore & M. S. Ry. Co. v. Boyts (Ind. App.) 45 N. E. 812; City of Leavenworth v. Hatch (Kan. Sup.) 45 Pac. 65; Cahill v. Railway Co., 92 Ky. 345, 18 S. W. 2; Baltimore & O. R. Co. v. State, 79 Md. 335, 29 Atl. 518; Alabama & V. Ry. Co. v. Davis, 69 Miss. 444, 13 South. 693; Follman v. City of Mankato, 35 Minn. 522, 29 N. W. 317; Noyes v. Boscawen, 64 N. H. 361, 10 Atl. 690; Robinson v. Railroad Co., 66 N. Y. 11; Kessler v. Railroad Co., 3 App. Div. 426, 38 N. Y. Supp. 799; Strauss v. Railway Co., 6 App. Div. 264, 39 N. Y. Supp. 998; Street-Railway Co. v. Eadie, 43 Ohio St. 91, 1 N. E. 519; Carlisle Borough v. Brisbane, 113 Pa. St. 544, 6 Atl. 372; Carr v. Easton City, 142 Pa. St. 139, 21 Atl. 822; Galveston, H. & S. A. Ry. Co. v. Kultac, 72 Tex. 643, 11 S. W. 127; Union Pac. Ry. Co. v. Lapsley, 2 C. C. A. 149, 51 Fed. 174, affirming 50 Fed. 172; Pyle v. Clark, 79 Fed. 744, affirming 75 Fed. 644. In Iowa the negligence of a driver of a vehicle will not be imputed to a passenger or invited guest. Nesbit v. Town of Garner, 75 Iowa, 314, 39 N. W. 516. But (1) when several parties are engaged in a common enterprise, and one is injured by the joint negligence of one of his associates and another, the negligence of his associates will be imputed to him, and will defeat all right of recovery against the other party; and (2) when a person is injured through the common negligence of one who, from their relation, is bound to care for and protect him, and another, the negligence of the former will be imputed to the latter, and will defeat a recovery against the other party. Payne v. Railroad Co., 39 Iowa, 523; Yahn v. City of Ottumwa, 60 Iowa, 429, 15 N. W. 257; Slater v. Railway Co., 71 Iowa, 209, 32 N. W. 264; Stafford v. City of Oskaloosa, 57 Iowa, 748, 11 N. W. 668.

12 Roach v. Railroad Co., 93 Ga. 785, 21 S. E. 67. The negligence of the driver of a private vehicle will be imputed to a person riding with him, where the vehicle is being used by both for the transportation of their personal property. Omaha & R. V. Ry. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599.

horses, and with whom he is riding, is imputable to the master.[13] In some of the states, however, the negligence of the owner and driver of a private vehicle is imputable to one voluntarily riding with him by invitation, and defeats the right of the latter to recover damages against a third person for injuries caused by the concurring negligence of both.[14] In New York it is held that the rule that the negligence of a driver of a vehicle may not be imputed to a passenger in an action for injuries alleged to have been caused by de-

[13] Smith v. Railroad Co., 4 App. Div. 493, 38 N. Y. Supp. 666. But a mother riding in a cab driven by her son is not chargeable with contributory negligence on account of his want of care. Weldon v. Railroad Co., 3 App. Div. 370, 38 N. Y. Supp. 206. One who, uninvited or without the knowledge of the driver of a private vehicle, gets upon such vehicle for the purpose of riding, and rides thereon, does not thereby assume the relation of master or superior to such driver; and therefore he is not chargeable with the negligence of the driver in driving or managing such vehicle. Cincinnati St. Ry. Co. v. Wright (Ohio) 43 N. E. 688.

[14] Prideaux v. City of Mineral Point, 43 Wis. 513; Otis v. Town of Janesville, 47 Wis. 422, 2 N. W. 783; Mullen v. City of Owosso, 100 Mich. 103, 58 N. W. 663 (following Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274, which the court said has never been departed from); Whittaker v. City of Helena, 14 Mont. 124, 35 Pac. 904. In Prideaux v. City of Mineral Point, 43 Wis. 513, Ryan, C. J., said: "A woman may and should refuse to ride with a man if she dislikes or distrusts the man or his horse or his carriage. But, if she voluntarily accepts his invitation to ride, the man may, indeed, become liable to her for gross negligence; but, as to third persons, the man is her agent to drive her; she takes man and horse and carriage for the jaunt, for better, for worse." If the driver of a vehicle is to be regarded as the agent of his invited guest, riding with him, it would follow that the guest is liable to third persons for the negligence of the driver. It would be a difficult task for the eloquence of even Chief Justice Ryan to establish this proposition.

fendant's negligence is only applicable to cases where the relation of master and servant and principal and agent does not exist, or where the passenger is seated away from the driver, or is separated from him by an inclosure, and is without opportunity to discover danger and to inform the driver of it.[15]

Of course, it is no less the duty of a passenger, where he has the opportunity to do so, than of the driver, to learn of danger, and avoid it, if practicable;[16] and a person riding in a private vehicle is guilty of contributory negligence in willingly joining with the driver in testing the danger arising from an obvious defect in a highway, and cannot recover from municipal authorities for losses incurred through such defect.[17]

§ 199. SAME—OF PARENT TO CHILD.

By the weight of authority, negligence of the custodian of a child of tender years will not be imputed to the child, so as to bar his cause of action against another, whose negligence concurred with that of the custodian in producing the injury to the child; but the negligence of the parent or guardian in the custody of the child will bar the parent's or guardian's cause of action for the damages he has sustained by reason of the child's injuries.

The rule imputing to a child of tender years the negligence of its parent, guardian, or custodian was

[15] Robinson v. Railroad Co., 66 N. Y. 11.

[16] Brickell v. Railroad Co., 120 N. Y. 290, 24 N. E. 449.

[17] Crescent Tp. v. Anderson, 114 Pa. St. 643, 8 Atl. 379.

introduced into the law of this country by Hartfield v. Roper,[1] decided in 1839, by one of the New York courts. The reasoning employed in support of this rule is thus stated by Cowen, J., who delivered the opinion in that case: "An infant is not sui juris. He belongs to another, to whose discretion the care of his person is exclusively confided. That person is agent and keeper for that purpose; and, in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect." The principle thus announced has since been recognized and is still adhered to by the courts of the state of New York,[2] has received the approval of a number of other courts

§ 199. [1] 21 Wend. 615. In this case it was specifically held that the negligence of the parents of a two year old child in permitting it to be in a highway is imputable to the child, and bars an action by his next friend for injuries sustained in being negligently run over by the driver of a wagon.

[2] Mangam v. Railroad Co., 38 N. Y. 455; Ihl v. Railroad Co., 47 N. Y. 317; Cosgrove v. Ogden, 49 N. Y. 255; Morrison v. Railway Co., 56 N. Y. 302; Thurber v. Railroad Co., 60 N. Y. 333; McGarry v. Loomis, 63 N. Y. 104; Huerzeler v. Railroad Co., 1 Misc. Rep. 136, 20 N. Y. Supp. 676; Metcalfe v. Railway Co. (Sup.) 42 N. Y. Supp. 661. Though the negligence of a driver is not imputable to an adult possessed of judgment and the right of self-control, who is riding with the driver, yet the negligence of the driver is imputable to a child of tender years riding with him, since he has the care and custody of the child. Metcalfe v. Railway Co. (Sup.) 42 N. Y. Supp. 661. The negligence of a father will not be imputed to his infant child, about 21 months old, where the child was injured while in the mother's arms, in a carriage driven by the father, as in such case the child was in the immediate custody of the mother, and not of the father. Hennessey v. Railroad Co., 6 App. Div. 206, 39 N. Y. Supp. 805. It has also been held that the negligence of the custodian of a lunatic will be imputed to the lunatic. Willetts v. Railroad Co., 14 Barb. (N. Y.) 585.

of equally high standing, and has been accepted and applied in California,[3] Delaware,[4] Indiana,[5] Maine,[6] Maryland,[7] Massachusetts,[8] and Minnesota.[9] In England, too, the doctrine has been adopted on the ground of the "identity" of the child and its custodian.[10]

But the doctrine of Hartfield v. Roper was challenged at an early day in this country,[11] and has been repudiated by most of our courts.[12] "Infants have legal

[3] McQuilken v. Railroad Co., 64 Cal. 463, 2 Pac. 46; Meeks v. Railroad Co., 52 Cal. 602, 56 Cal. 513; Karr v. Parks, 40 Cal. 188; Schierhold v. Railroad Co., Id. 447.

[4] Kyne v. Railroad Co., 8 Houst. 185, 14 Atl. 922.

[5] Citizens' St. R. Co. v. Stoddard, 10 Ind. App. 278, 282, 37 N. E. 723; Terre Haute St. Ry. Co. v. Tappenbeck, 9 Ind. App. 422, 36 N. E. 915; Pittsburgh, F. W. & C. Ry. Co. v. Vining's Adm'r, 27 Ind. 513; Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70; Lafayette & I. R. Co. v. Huffman, 28 Ind. 287; Hathaway v. Railway Co., 46 Ind. 25.

[6] Leslie v. City of Lewiston, 62 Me. 468; O'Brien v. McGlinchy, 68 Me. 552.

[7] McMahon v. Railway Co., 39 Md. 438; Baltimore City Passenger Ry. Co. v. McDonnell, 43 Md. 534.

[8] Gibbons v. Williams, 135 Mass. 333; McGeary v. Railroad Co., Id. 363; O'Connor v. Railroad Corp., Id. 352; Holly v. Gaslight Co., 8 Gray (Mass.) 123; Wright v. Railroad Co., 4 Allen (Mass.) 283; Callahan v. Bean, 9 Allen (Mass.) 401; Lynch v. Smith, 104 Mass. 52.

[9] Reed v. Railway Co., 34 Minn. 557, 27 N. W. 77; Fitzgerald v. Railroad Co., 29 Minn. 336, 13 N. W. 168; City of St. Paul v. Kuby, 8 Minn. 154 (Gil. 125).

[10] Waite v. Railway Co. (1858) El., Bl. & El. 719. In this case it was held that the negligence of a grandmother in attempting to cross a railroad track at a station in the face of an advancing train must be imputed to the child.

[11] Robinson v. Cone (1850) 22 Vt. 213, per Redfield, J.

[12] Even in states where the doctrine is recognized, it has no application in a case where, notwithstanding negligence on the part of the parents in permitting their child to be exposed to peril, the child

rights distinct from their parents, among which is the right to security from personal injuries occasioned by the negligence or willful wrong of others. Negligence or dereliction of the parent or custodian of children is no justification for others to injure them." [13] "Nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of respondeat superior should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen with some propriety from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But, in the relationship between the infant and its keeper, all these decisive characteristics are entirely wanting. The law imposes the keeper on the child, who, of course, can neither control nor remove him; and the injustice, therefore, of making the latter responsible, in any measure whatever, for the acts of the former, would seem to be quite evident. Such subjectivity would be hostile in every respect to the natural rights of the infant, and consequently cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is

itself exercised due care. O'Brien v. McGlinchy, 68 Me. 552; Lynch v. Smith, 104 Mass. 52; Lannen v. Gas Light Co., 46 Barb. (N. Y.) 264; Ihl v. Railroad Co., 47 N. Y. 317; McGarry v. Loomis, 63 N. Y. 104; Huerzeler v. Railroad Co., 1 Misc. Rep. 136, 20 N. Y. Supp. 676.

[13] Westbrook v. Railroad Co., 66 Miss. 560, 6 South. 321.

necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian: 'You and I, by our common carelessness, have done this wrong, and therefore neither can look to the other for redress.' But when such wrongdoer says to the infant: 'Your guardian and I, by our joint misconduct, have brought this loss upon you. Consequently you have no right of action against me, but you must look for your indemnification to your guardian alone,'—a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer by imputation, is a logical contrivance, uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence, nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent; the consequence being that he can in no case be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice or hardship in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance." [14] For reasons such as these, the doctrine has been rejected by the

[14] Newman v. Railroad Co., 52 N. J. Law, 446, 19 Atl. 1102.

courts of Alabama,[15] Arkansas,[16] Connecticut,[17] Georgia,[18] Illinois,[19] Iowa,[20] Kansas,[21] Louisiana,[22] Michigan,[23] Mississippi,[24] Missouri,[25] Nebraska,[26] New Jersey,[27] North Carolina,[28] Ohio,[29] Pennsylvania,[30] Tennessee,[31] Texas,[32] Vermont,[33] and Virginia.[34]

[15] Government St. R. Co. v. Hanlon, 53 Ala. 70; Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 3 South. 555. In the first of these cases it was said: "It seems repulsive to our sense of justice that, because the parent is negligent of the child, others may with impunity be equally negligent of its helplessness, and equally indifferent of its necessities. The law may not compel active charity for the relief of the child, but it does shield him from positive wrong or neglect."

[16] St. Louis, I. M. & S. Ry. Co. v. Rexroad, 59 Ark. 180, 26 S. W. 1037.

[17] Daley v. Railroad Co., 26 Conn. 591.

[18] Ferguson v. Railway Co., 77 Ga. 102; Atlanta & C. Air-Line Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550.

[19] Chicago City Ry. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899, affirming 33 Ill. App. 450; Elgin, J. & E. Ry. Co. v. Raymond, 47 Ill. App. 242.

[20] Wymore v. Mahaska Co., 78 Iowa, 396, 43 N. W. 264.

[21] Union Pac. Ry. Co. v. Young, 57 Kan. 168, 45 Pac. 580. But see, contra, Smith v. Railroad Co., 25 Kan. 738, 28 Kan. 541.

[22] Westerfield v. Levis, 43 La. Ann. 63, 9 South. 52.

[23] Battishill v. Humphreys, 64 Mich. 494, 31 N. W. 894; Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584; Mullen v. City of Owosso, 100 Mich. 103, 58 N. W. 663.

[24] Westbrook v. Railroad Co., 66 Miss. 560, 6 South. 321.

[25] Winters v. Railway Co., 99 Mo. 509, 12 S. W. 652.

[26] Huff v. Ames, 16 Neb. 139, 19 N. W. 623.

[27] Newman v. Railroad Co., 52 N. J. Law, 446, 19 Atl. 1102.

[28] Bottoms v. Railroad Co., 114 N. C. 699, 19 S. E. 730.

[29] Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399; Cleveland, C., C. & I. R. Co. v. Manson, 30 Ohio St. 451; Street-Railway Co. v. Eadie, 43 Ohio St. 91, 1 N. E. 519.

[30–34] See notes 30–34 on following page.

Of course, if the negligence of a child's custodian is the sole or the proximate cause of injuries to it, there can be no recovery against a third person, whose negligence contributed only remotely to the result.[35]

A different question is presented when the action is brought, not by the child or in the child's behalf, but by the parent or guardian, for the damages he has sustained by reason of the loss of the child's services, medical expenses, etc. In this class of cases it is

30 Erie City Pass. Ry. Co. v. Schuster, 113 Pa. St. 412, 6 Atl. 269; North Pennsylvania R. Co. v. Mahoney, 57 Pa. St. 187; Kay v. Railroad Co., 65 Pa. St. 269.

31 Whirley v. Whiteman, 1 Head (Tenn.) 609.

32 Texas & P. Ry. Co. v. Beckworth (Tex. Civ. App.) 32 S. W. 809; Texas & P. Ry. Co. v. Fletcher, 6 Tex. Civ. App. 736, 26 S. W. 446; Galveston, H. & H. Ry. Co. v. Moore, 59 Tex. 64; Williams v. Railroad Co., 60 Tex. 205.

33 Robinson v. Cone, 22 Vt. 213.

34 Trumbo's Adm'r v. Street-Car Co., 89 Va. 780, 17 S. E. 124; Norfolk & W. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454; Norfolk & P. R. Co. v. Ormsby, 27 Grat. (Va.) 455.

35 A three year old child injured by the rudder chain, guarded as is customary on steamships, cannot recover, as the accident is attributable solely to the negligence of the nurse, who permitted it to run around unattended. The Burgundia, 29 Fed. 464. The negligence of a parent or guardian having in charge a child of tender years will not excuse a carrier by rail from using all the means in its power to prevent injury to the child; yet if the negligence of the parent is the proximate cause of injury to the child, by unnecessarily and imprudently exposing it to danger, the carrier cannot be held responsible, unless it is shown to have omitted duties the discharge of which would have averted the injury. Hence the negligence of a father in placing his child on the lower step of a moving car, to enable them to leave quickly when the train should come to a stop at a station, precludes a recovery against the company for injuries sustained by the child in falling from the car before it has stopped. Ohio & M. Ry. Co. v. Stratton, 78 Ill. 88.

settled that the negligence of the custodian of the child is a good defense. The reason is obvious. It rests upon the principle that one whose negligence has contributed to bring an injury upon himself cannot recover from another whose negligence has concurred in producing this result. Even in those jurisdictions which have repudiated the doctrine of imputable negligence, as announced in Hartfield v. Roper, there has been no departure from this principle, and this rule has been universally recognized and strictly enforced.[36]

It is equally well settled that, though the father was not himself present, but the injury to the child occurred while it was under the care and charge of another person, to whom its safety had been intrusted, the rule would still apply in all its strictness. It being the imperative legal duty of the father to guard and shield his child from injury, if he delegates that duty to another, he is legally responsible for the conduct of that other, whose every act is, in legal contemplation, the act of the father himself.[37]

[36] Westbrook v. Railroad Co., 66 Miss. 560, 6 South. 321; Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584; Glassey v. Railway Co., 57 Pa. St. 172; Erie City Pass. Ry. Co. v. Schuster, 113 Pa. St. 412, 6 Atl. 269; Bellefontaine Ry. Co. v. Snyder, 24 Ohio St. 670; Street-Railway Co. v. Eadie, 43 Ohio St. 91, 1 N. E. 519; Williams v. Railroad Co., 60 Tex. 205; Chicago City Ry. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899, affirming 33 Ill. App. 450; Chicago & A. R. Co. v. Logue, 158 Ill. 621, 626, 42 N. E. 53; Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 3 South. 555; Huff v. Ames, 16 Neb. 139, 19 N. W. 623; Norfolk & W. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454; Wymore v. Mahaska Co., 78 Iowa, 396, 43 N. W. 264; Jeffersonville, M. & I. R. Co. v. Bowen, 49 Ind. 154, affirming 40 Ind. 545.

[37] Bellefontaine Ry. Co. v. Snyder, 24 Ohio St. 630.

Whether this rule should be extended to cover a case where an administrator sues for the wrongful homicide of a child, caused by the concurrent negligence of the child's parents and of a third person, but to which suit neither of the parents is a party plaintiff, is a question not so easy of determination. In Illinois it has been said that the reason for the rule applies equally to such a case, because the inevitable result of such a recovery by the administrator would be to enrich the child's parents, who would inherit his estate, and thus profit by their own gross neglect of duty.[38] But a contrary view was expressed by the supreme court of Iowa.[39] Robinson, J., delivering the opinion, directs attention to the fact that the administrator seeks to recover in the right of the child, and not for the parents, and adds: "It may be that a recovery in this case will result in conferring an undeserved benefit upon the father, but that is a matter which we cannot investigate. If the facts are such that the child could have recovered had his injuries not been fatal, his administrator may recover the full amount of damages which the estate of the child sustained." The same position has been taken in Virginia [40] and in Georgia.[41]

It remains to notice what facts will constitute negli-

[38] Toledo, W. & W. Ry. Co. v. Grable, 88 Ill. 441; Chicago & N. W. Ry. Co. v. Schumilowsky, 8 Ill. App. 613; Chicago City Ry. Co. v. Wilcox, 33 Ill. App. 450; Id., 138 Ill. 370, 27 N. E. 899.

[39] Wymore v. Mahaska Co., 78 Iowa, 396, 43 N. W. 264.

[40] Norfolk & W. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454.

[41] Atlanta & C. Air-Line Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550. The opinion in this case contains an exhaustive and able review of all the learning on this subject.

gence in the custody of a child, so far as this question is connected with the subject of carriers. It has been held that it is not negligence to permit a child six or eight years old to take passage in a street car without a protector.[42] So, a mother is not guilty of negligence in sending her 11 year old son on a railroad journey of 7 miles, where she cautioned him of the dangers of the route to the extent of her knowledge,[43] or in sending a 12 year old boy to a depot to meet his sister, expected to arrive on a train.[44] So, it is not per se negligence for a mother to permit a 12 year old boy traveling with her, and unable to find a seat in the car with her, to go into another car.[45]

[42] East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503; Buck v. Power Co., 46 Mo. App. 555; Drew v. Railroad Co., 26 N. Y. 49, 1 Abb. Dec. (N. Y.) 556, *42 N. Y. 429.

[43] Hemmingway v. Railway Co., 72 Wis. 42, 37 N. W. 804.

[44] New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

[45] Downs v. Railroad Co., 47 N. Y. 89. A seven year old boy, who was a steerage passenger on board a steamship, with his father and mother, got up from his seat on the deck, where all passengers had been assembled by order of the captain, and attempted to follow his father for a drink of water. In so doing, he was crowded by his fellow passengers against an exposed rudder chain, on which he placed his foot. It was immediately drawn into a block, and crushed. Held, that a finding by the jury that plaintiff was not on the deck unattended, and that his parents exercised ordinary care for his safety, was sustained by the evidence. Garoni v. Compagnie Nationale De Navigation (Com. Pl.) 14 N. Y. Supp. 797, affirmed in 131 N. Y. 614, 30 N. E. 865.

§ 200. SAME—OF HUSBAND TO WIFE.

At common law, the negligence of the husband, concurring with that of a third person in producing injury to the wife, bars recovery against the third person. The reason is that at common law the recovery would be for the benefit of the husband, who must be a party to the action, and who has the right to reduce all the wife's choses in action to his possession. The question in each state would therefore seem to be how far the common-law rule respecting the property rights of married women has been abrogated by statute.

In New Jersey [1] it has been held that the common-law rule has not been changed by the married woman's statute, which declares that the real and personal property of every married woman, and the rents, issues, and profits thereof, shall be her sole and separate property. Personal torts do not create rights of property. The right to sue for such torts is not assignable, and they do not survive the death of the injured person. So, in California [2] and in Texas [3] the negligence of a husband, concurring with that of a third person in injuring his wife, will be imputed to her, because the right to recover for such injuries is community property, which the husband has the right to control. So, in Illinois [4] it has been held that, where

§ 200. [1] Pennsylvania R. Co. v. Goodenough, 55 N. J. Law, 577, 28 Atl. 3.

[2] McFadden v. Railway Co., 87 Cal. 464, 25 Pac. 681.

[3] Missouri Pac. Ry. Co. v. White, 80 Tex. 202, 15 S. W. 808.

[4] Toledo, St. L. & K. C. R. Co. v. Crittenden, 42 Ill. App. 469, citing City of Rock Island v. Vanlandschoot, 78 Ill. 485.

a team is in the control of the plaintiff's husband, a want of ordinary care on his part in its management, contributing to an injury to her, is chargeable to her, and will bar a recovery against a railroad company for its negligence in frightening the team.

But in most of the states the opposite view prevails. Under the Missouri married woman's statute, which declares that a married woman's right of action for personal injuries is her sole and separate property, the negligence of her husband cannot be imputed to her, so as to bar a recovery by her for injuries sustained through the concurrent negligence of a third person; and it is immaterial that the husband is joined with her as a co-plaintiff.[5] So, in Indiana [6] it is held that the negligence of a husband in driving a team cannot be imputed to his wife, who is under his control and protection. Before his negligence would be imputed to her, it should appear that he was her agent, or was so united with her in a common enterprise that his act became her act. In other words, he must be under her control and direction. "In our opinion, there would be no more reason or justice in a rule that would, in cases of this character, inflict upon a wife the consequences of her husband's negligence, solely and alone because of that relationship, than to hold her accountable at the bar of eternal justice for his

[5] Flori v. City of St. Louis, 3 Mo. App. 231.

[6] Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 403, 33 N. E. 280, 34 N. E. 218; Louisville, N. A. & C. R. Co. v. Creek, 130 Ind. 139, 29 N. E. 481.

sins because she was his wife." [7] This is the position that has been adopted by the courts of last resort in New York,[8] Ohio,[9] Georgia,[10] and Kansas.[11]

§ 201. SAME—OF WIFE TO HUSBAND.

Does the wife's negligence which has contributed, with that of a third person, in bringing an injury upon herself, bar the husband's right of action against the third person for medical expenses, loss of society and of services? It is a little remarkable that there should be dearth of authority on this point, but I have found only one case in which the question was raised. In Honey v. Railroad Co.,[1] decided by the federal circuit court in Iowa, it was held that the wife's contributory negligence is not a bar to the husband's right of action, in a state the statutes of which relieve her of all common-law disabilities, and him of all responsibility for her torts. The husband's right of action legally and logically is based upon the negligence of defendant, resulting in an invasion of his legal rights, and not upon any right of action accruing to or derived from the wife.

[7] McBride, J., in Louisville, N. A. & C. R. Co. v. Creek, 130 Ind. 139, 29 N. E. 481.

[8] Platz v. City of Cohoes, 26 Hun, 391, affirmed in 89 N. Y. 219; Hoag v. Railroad Co., 111 N. Y. 199, 18 N. E. 648.

[9] Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350.

[10] Atlanta & C. Air-Line Ry. Co. v. Gravitt, 93 Ga. 369, 386, 20 S. E. 550. See, also, Sheffield v. Telephone Co., 36 Fed. 164; Shaw v. Craft, 37 Fed. 317.

[11] Reading Tp. v. Telfer (Kan. Sup.) 18 Pac. 134.

§ 201. [1] 59 Fed. 423.

CHAPTER XV.

WHO ARE COMMON CARRIERS.

§ 202. Common Carrier of Passengers Defined.
203. Railroad Companies.
204. Union-Depot Companies.
205. Sleeping-Car Companies.
206. Street-Railroad Companies.
207. Proprietors of Road Vehicles.
208. Vessel Owners.
209. Passenger Elevators.

§ 202. COMMON CARRIER OF PASSENGERS DEFINED.

A common carrier of passengers is one who undertakes for hire to carry all persons, indifferently, who may apply for passage.[1]

To constitute one a common carrier, it is necessary that he should hold himself out to the community as

§ 202. [1] Nashville & C. R. Co. v. Messino, 1 Sneed (Tenn.) 220. A common carrier is a person or corporation pursuing the public employment of conveying goods or passengers for hire. Quimby v. Railroad Co., 150 Mass., at page 371, 23 N. E. 205. A common carrier is one whose usual business it is to carry. Fuller v. Railroad Co., 21 Conn. 557. The term is defined by statute in some of the states. "Every one who offers to the public to carry persons or property is a common carrier of whatever he thus offers to carry." Civ. Code Cal. § 2168; Civ. Code Mont. 1895, § 2870; Comp. Laws Dak. 1887, § 3881. "One who pursues the business of transporting the property or persons of others constantly and continuously for any period of time is a common carrier." Code Ga. 1882, § 2066. Sanb. & B. Ann. St. Wis. § 3214, provides that every company formed for the purpose of transporting passengers or property shall be deemed a common carrier.

such. This may be done, not only by advertising, etc., but by actually engaging in the business and pursuing the occupation as an employment.[2] It is not, however, every carrying of passengers for hire that constitutes a party a common carrier. The test is the occupation of carrying all members of the public who may offer themselves for transportation. "Common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they act. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. * * * The theory occasionally announced that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, while the nature of his duties renders him a common carrier still." [3]

§ 203. RAILROAD COMPANIES.

Railroad companies are by far the most important class of our common carriers at the present day. All the older methods of land transportation have been practically rendered obsolete whenever and wherever they have come into competition with the railroads. Being incorporated by law for the transportation of

[2] Nashville & C. R. Co. v. Messino, 1 Sneed (Tenn.) 220.

[3] New York Cent. R. Co. v. Lockwood, 17 Wall. 357, per Bradley, J. The obligations and liabilities of a common carrier are not dependent on contract, though they may be modified and limited by contract. Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262.

persons and property for hire over the lines of their respective roads, and being vested with the power of taking private property for a public use, railroad companies are common carriers of both persons and property. These are the objects for which they are constituted by law. It is their public employment, their principal and direct business, and not a casual or occasional occupation with them; and this beyond doubt constitutes them common carriers of both descriptions.[1] In many states they are declared to be such by statute.[2]

But a railroad company is a common carrier of passengers only by the vehicles which it holds out to the public as designed for the transportation of passengers. It is not, for example, a common carrier in respect to its hand cars, unless it has held itself out to the public as such, or authorized its agents so to do.[3]

§ 203. [1] Flinn v. Railroad Co., 1 Houst. (Del.) 469; Caldwell v. Railroad Co., 89 Ga. 550, 15 S. E. 678. One engaged in the business of transporting passengers for hire on a railroad operated by him is a common carrier. Davis v. Button, 78 Cal. 247, 18 Pac. 133, and 20 Pac. 545.

[2] Mills' Ann. St. Colo. p. 350, § 494; Hill's Code Or. § 3254; Rev. St. Mo. 1889, § 2631; Const. W. Va. art. 11, § 9; and Code W. Va. p. 530, § 71,—declare railroads to be public highways, free to all persons for transportation on payment of regular charges. Const. Mo. 1875, art. 12, § 14, which declares railroads public highways, does not authorize one to ride on their cars without their consent and without payment of fare. Farber v. Railway Co., 116 Mo. 81, 22 S. W. 631, citing Hyde v. Railway Co., 110 Mo. 272, 19 S. W. 483.

[3] Hoar v. Railroad Co., 70 Me. 65. The mere fact that a section foreman invites a person to ride with him on a hand car does not impose on the railroad company the responsibility of a common carrier to such person. A section foreman has no right to accept pas-

So, it has been said that railroad companies are not to be regarded as common carriers of passengers by their freight trains, unless they make it an habitual business.[4] So, railroad contractors engaged in building a railroad and running a construction train not adapted for passengers are not common carriers as to a person who takes passage on the train, and pays the fare, and as to him they are bound to exercise only such care and skill in the management and running of the trains as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances.[5] So, a superintendent of construction and civil engineer of a railroad has not power, as such, to convert a construction train into a passenger train, and cannot open an incomplete road for passenger traffic without the consent of his superior officers.[6] So, a logging company operating a logging railroad on its own land, in connection with its business, is a private, and not a common, carrier, even though it permits persons to ride gratuitously on its trains; and a constitutional provision that all railroads are public high-

sengers for transportation, and bind the company for their safe carriage, and every man may be safely presumed to know this much. Id.

[4] Murch v. Railroad Corp., 29 N. H. 9. A company, though not doing a general business as a carrier of passengers, but which allows passengers to ride on its engines, and receives fare, is liable to a person who, while so carried, is injured by a defect therein which might have been prevented. Millwood Coal & Coke Co. v. Madison (Pa. Sup.) 2 Atl. 39.

[5] Shoemaker v. Kingsbury, 12 Wall. 369.

[6] Evansville & R. R. Co. v. Barnes, 137 Ind. 366, 36 N. E. 1092.

ways, and all railroad companies common carriers, does not apply to such a railroad.[7]

In view of the agitation in some quarters for the governmental ownership of railways, an interesting question may arise as to whether the government can be held liable as a common carrier, independent of statute. The negative has been held by the supreme court of Canada. "The establishment of government railways in Canada, of which the minister of canals and railways has the management, direction, and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police, created by statute, for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation. The crown is therefore not liable as a common carrier for the safety and security of passengers using such railways; and there can be no recovery against the crown for injury to a passenger on a government railway, though it is in a most unsafe state from the rottenness of ties, and though the safety of life has been recklessly jeopardized by running trains over it with passengers." [8] But the conductor of a government railway is personally liable for injuries to a passenger getting on board, caused by his negligent starting of the train, though the contract of carriage is not with him, but with the crown.[9] On

[7] Wade v. Lumber Co., 20 C. C. A. 515, 74 Fed. 517.

[8] Reg. v. McLeod, 8 Can. Sup. Ct. 1.

[9] Hall v. McFadden, 19 N. B. 341, 21 N. B. 386, affirmed by the supreme court of Canada May 1, 1883. Cassell's Dig. Sup. Ct. pp. 723, 724.

the other hand, it has been held in Australia that the board of land and works of Victoria, in which is vested the title of the state railways of that colony, is subject to all the ordinary liabilities for negligence to which any company or body carrying on a similar business would, under like circumstances, be amenable; and it is liable for injuries to a person accompanying a passenger to a station, occasioned by its neglect to furnish sufficient lights.[10]

In this country it has been held that a railroad undertaking the transportation of prisoners of war under a contract with the government is not a governmental agency, so as to exempt it from liability for injuries to a soldier on guard, caused by the negligence of its servants.[11]

§ 204. UNION-DEPOT COMPANIES.

A union-depot company, at whose depot all the railway lines entering a city arrive and depart, is, as to passengers at such a depot, a common carrier, subject to the same liability, within the sphere of its operations, as the railroad companies from whose shoulders it takes the burden.[1]

10 Sweeny v. Board of Land, 4 Vict. Law R. (L.) 440.

11 Truex v. Railway Co., 4 Lans. (N. Y.) 198.

§ 204. 1 Indianapolis Union Ry. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219.

§ 205. SLEEPING-CAR COMPANIES.

It is sometimes loosely said that sleeping-car companies are not common carriers, meaning thereby to convey the idea that they are not liable as insurers of the passenger's personal effects carried by him into the car. But, manifestly, sleeping-car companies are common carriers, subject to all the duties of common carriers, so far as the construction and maintenance of their coaches and the personal safety and comfort of their passengers are concerned. Like a railway company, the sleeping-car company exercises special privileges and franchises granted to it by the state, and its business is transacted almost exclusively with the traveling public. Its cars on the various lines of road are extensively advertised all over the country, setting forth, in fitting terms, the accommodations and comforts they afford, rates of charges, etc.; and the public are earnestly invited to avail themselves of the advantages and comforts they offer. In no respect, therefore, does a sleeping-car company differ, in its relation to the public, from an ordinary railway company, in so far as the safety of its cars is concerned.[1]

But the federal circuit court for Missouri has recently said: "While it is true the owners of sleeping cars, as ordinarily operated on our railroads, are not

§ 205. [1] Nevin v. Car Co., 106 Ill. 222, 229. A sleeping-car company owes its passengers the duty of exercising a high degree of care for their safety. Pullman's Palace-Car Co. v. Fielding, 62 Ill. App. 577. Pub. St. N. H. 1891, p. 453, § 10, declares all persons and corporations operating sleeping and parlor cars within the state common carriers. See, also, post, §§ 378, 639.

to be treated as common carriers with respect to their liability to patrons, it is equally true, from the nature and character of their business, in which they are brought into close and important relations, affecting the comfort and safety of a large portion of the traveling public, they ought to be, and must be, held responsible for the discharge of certain general duties, involving the exercise of ordinary and reasonable care towards them." [2]

§ 203. STREET-RAILROAD COMPANIES.

A street-railroad company is a common carrier of passengers, with duties and responsibilities entirely analogous to, and substantially the same as, those of a railroad company in the carriage of passengers. Both are "railway companies," within the usual meaning of that term, and the same general rules and degree of care must be observed by each.[1]

[2] Hughes v. Car Co., 74 Fed. 499.

§ 206. [1] Citizens' St. Ry. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; Jackson v. Railway Co., 118 Mo. 199, 224, 24 S. W. 192; Smith v. Railway Co., 32 Minn. 1, 18 N. W. 827; Watson v. Railway Co., 42 Minn. 46, 43 N. W. 904; Pray v. Railway Co., 44 Neb. 167, 62 N. W. 447; Spellman v. Transit Co., 36 Neb. 890, 55 N. W. 270. A street-railway company, by undertaking the transportation of passengers for hire, assumes towards its patrons the relation of a common carrier, without regard to the character of the easement possessed by it in its right of way. East Omaha St. R. Co. v. Godola (Neb.) 70 N. W. 491. See, also, ante, § 18.

§ 207. PROPRIETORS OF ROAD VEHICLES.

Proprietors of stage coaches carrying passengers for hire from place to place are common carriers.[1] So, courts take judicial notice that the owner of an omnibus line is a common carrier of passengers and their baggage; and, if it is otherwise, he must make it appear.[2] So, a hackman, who transports persons from a railroad depot to various parts of the city for hire, is a common carrier.[3]

On the question whether or not a livery stable keeper, who lets out his horses, carriage, and driver for a specified journey, is a common carrier, the authorities are divided. In England it is held that he is. "A person who lets out carriages is not, in my opinion, responsible for all defects, discoverable or not. He is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but, in my opinion, he is bound to take as much care as they; and, although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose

§ 207. [1] See ante, § 19. How. Ann. St. Mich. § 3656, declares that stagecoach companies shall be common carriers.

[2] Parmelee v. McNulty, 19 Ill. 556.

[3] Lemon v. Chanslor, 68 Mo. 341. A street railroad which uses hacks to convey passengers from the terminus of its line to a cemetery is required, as a common carrier, to use the utmost care and skill to preserve the safety of its passengers. Ponce v. Railway Co., 53 Iowa, 278, 5 N. W. 177.

for which it is hired as care and skill can render it; and if, while the carriage is being properly used for such purpose, it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was, in the proper sense of the word, an accident, not preventible by any care or skill. * * * Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let carriages for hire. As between him and the hirer, the risk of defects in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage. The lender has it in his power, not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover this expense." [4] A similar ruling has been made by the supreme court of Vermont,[5] and by one of the appellate courts of Illinois.[6] But a contrary view has been taken by another appellate court of Illinois,[7] and by the St. Louis court of appeals.[8] Both of these courts

[4] Hyman v. Nye (1881) 6 Q. B. Div. 685. To same effect, see Jones v. Page, 15 Law T. (N. S.) 619.

[5] Hadley v. Cross (1861) 34 Vt. 586.

[6] Benner Livery & Undertaking Co. v. Busson, 58 Ill. App. 17, citing Tuller v. Talbot, 23 Ill. 298; Frink v. Potter, 17 Ill. 410.

[7] Payne v. Halstead, 44 Ill. App. 97.

[8] Siegrist v. Arnot, 10 Mo. App. 197. In an action against a liveryman for injuries sustained from a defect in the vehicle, an instruction that defendants were required to use ordinary care and diligence in discharging their obligations to plaintiff, including ordinary care and skill in driving the team, is as favorable to defendants as they are entitled to have it stated; and, though the petition alleges that

held that a livery stable keeper is merely a private carrier for hire, and, as such, bound to exercise only that degree of care which a prudent man experienced in the business is accustomed to use under similar circumstances; that is to say, ordinary skill, diligence, and prudence.

§ 208. VESSEL OWNERS.

Owners of vessels carrying passengers for hire are common carriers.[1] This includes ferrymen.[2]

§ 209. PASSENGER ELEVATORS.

Proprietors and managers of passenger elevators are the latest addition made by the law to the category of common carriers. The relation between the owner and manager of an elevator for passengers and those carried in it is similar to that between an ordinary common carrier of passengers and those carried by him.[1] The aged, the helpless, and the infirm are daily using these elevators. The owners make profit by them, or use them for the profit they bring. The injury from a careless use of these elevators is likely to fall on the weakest of the community. All, including the strongest, are without the means of self-pro-

defendants are common carriers, a refusal to charge that defendants are not common carriers is not prejudicial. Erickson v. Barber, 83 Iowa, 367, 49 N. W. 838.

§ 208. [1] See post, c. —.

[2] Jabine v. Midgett, 25 Ark. 474; May v. Hanson, 5 Cal. 360; Morrissey v. Ferry Co., 47 Mo. 521; Smith v. Seward, 3 Pa. St. 342.

§ 209. [1] Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873.

tection upon the breaking down of the machinery. The law therefore throws around such persons its protection, by requiring the highest care and diligence.[2] It has been held that the proprietor of an elevator must exercise great care and caution in the construction and operation of the elevator, even as to his employés;[3] but the true rule undoubtedly is that, as to employés, the owner need exercise only ordinary care and prudence.[4]

[2] Treadwell v. Whittier, 80 Cal. 578, 22 Pac. 266; Kentucky Hotel Co. v. Camp (Ky.) 30 S. W. 1010; McGrell v. Building Co., 90 Hun. 30, 35 N. Y. Supp. 599; Southern Building & Loan Ass'n v. Lawson (Tenn. Sup.) 37 S. W. 86.

[3] Wise v. Ackerman, 76 Md. 375, 25 Atl. 424.

[4] McDonough v. Lanpher, 55 Minn. 501, 57 N. W. 152.

CHAPTER XVI.

WHO ARE PASSENGERS.

§ 210. "Passenger" Defined.
211. Postal Agents.
212. Express Messengers.
213. Porter on Sleeping Car.
214. Drover Accompanying Stock.
215. Person Engaged in Business on Carrier's Vehicle.
216. Person Assisting Carrier's Servant.
217. Carrier's Employés.
218. Soldiers.
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220. Persons Engaged in Illegal Acts—Sunday Travel.
221. Prepayment of Fare.
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223. Same—Fraudulent Use of Pass or Ticket.
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225. Persons on Freight Trains.
226. Persons on Other Non Passenger Carrying Vehicles.
227. Persons on Wrong Train.
228. When Relation Begins—Persons at Station.
229. Same—Omnibus and Street Car.
230. Same—Persons Boarding Moving Trains or Street Cars.
231. When Relation Terminates.
232. Same—Failure to Leave Train.
233. Same—Street Cars.
234. Same—Passenger Leaving Conveyance at Intermediate Station.

§ 210. "PASSENGER" DEFINED.

One who, with the consent, express or implied, of a common carrier, rides in a conveyance provided by the carrier for the transportation of passengers, is a passenger while so riding, and

while on the carrier's premises going to and from the conveyance, provided he is not in the carrier's employment.

It is not easy to construct a definition of the term "passenger" which, on the one hand, will accurately include all persons entitled to the rights of passengers, and, on the other, exclude all those who are not.[1] The best that can be done in such a definition is to state broadly the essential elements on which the courts have insisted in deciding whether or not a particular person is a passenger.

Laying out of view for the present the question as to when the relation of carrier and passenger begins and ends, we shall first inquire as to the classes of persons entitled to the rights of passengers. In the great majority of cases, there can be no question on this score, because a person riding in a passenger coach who has prepaid his fare is necessarily a passenger. The cases which have turned on the question whether a person is a passenger are in reality exceptional cases.

§ 210. [1] Not many definitions of the term have been attempted by the courts. The following is by the supreme court of Pennsylvania: "In its legal sense, a passenger is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as equivalent therefor." Pennsylvania R. Co. v. Price, 96 Pa. St. 256, 267, quoted in Pricker v. Railroad Co., 132 Pa. St. 1, 18 Atl. 983. "It is essential to constitute one a passenger riding on a train of the carrier operating such train that such person should be rightfully on such train, or should be thereon with the knowledge or consent of the carrier, or his agent in charge of the train." Woolsey v. Railroad Co., 39 Neb. 793, 801, 58 N. W. 444.

and it is to these exceptional cases that our attention must be turned.

§ 211. POSTAL AGENTS.

A United States postal agent riding on a railroad train in the discharge of his duties, under a contract between the government and the company, occupies the position of a passenger with respect to the company's liability for its negligence.[1] "Essentially the relation of carrier and passenger exists in every case in

§ 211. [1] Mellor v. Railway Co., 105 Mo. 455, 16 S. W. 849; Magoffin v. Railway Co., 102 Mo. 540, 15 S. W. 76; Libby v. Railroad Co., 85 Me. 34, 26 Atl. 943; Seybolt v. Railway Co., 95 N. Y. 562, affirming 31 Hun, 100; Hammond v. Railroad Co., 6 S. C. 130; Norfolk & W. R. Co. v. Shott, 92 Va. 34, 22 S. E. 811; Louisville & N. R. Co. v. Kingman (Ky.) 35 S. W. 264; Arrowsmith v. Railroad Co., 57 Fed. 165. A railway company is under a duty to exercise due care and skill in the transportation of a postal official designated by the postmaster general, as required by statute, to travel with mails carried on defendant's road. The duty to carry with reasonable skill and diligence does not arise out of contract, but is imposed by law. Collett v. Railway Co. [1851] 16 Q. B. 984. A different rule obtained at one time in England. Defendant had entered into a contract with the postmaster general to provide the mail coach for the transportation of the mail over a certain route, and a third person had entered into another contract with the postmaster general to supply the horses and coachmen. One of the coachmen so employed was injured while driving the coach, by its breaking down from latent defects in its construction. Held, that defendant was not liable to the coachman, because there was no contract between the two, defendant's only obligation being to the postmaster general. "The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty." Winterbottom v. Wright, 10 Mees. & W. 109. It is needless to add that the principle of this decision is repudiated by all the American cases on the subject.

which the carrier receives and agrees to transport another not in its employment, whether this be by contract between them, or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer. * * * Whether the public carrier of passengers receives an agreed compensation for the carriage of such persons, is compensated therefor by the charge for the car, or for transportation of the property of which the person to be carried has charge, or receives no compensation whatever for the carriage of such person, is a matter of no importance. It is enough that he is lawfully on the car, and entitled to transportation, to give him the character of a passenger, and to entitle him to recover for an injury resulting from the negligence of the carrier or its servants, if this occurs without fault on his own part. If there be necessarily more danger in traveling in the coach prepared and used for the transportation of mail, even when due care is used, than in traveling in the coaches prepared and used for transportation of ordinary passengers, then it may be held that a mail agent assumes the risk of danger necessarily thus arising from the position of the mail car in the train, but he does not assume any risk of danger that may result from the negligence of the carrier or its servants." [2] Such a postal agent is a passenger, not only while in

[2] Gulf, C. & S. F. R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280. Whatever may be the precise status of a mail clerk on a railway train, he is entitled to recover from the company for injuries resulting from its negligence. Houston & T. C. R. Co. v. Hampton, 61 Tex. 127.

charge of the mails, but also while traveling free of charge from the end of his route to his home; and the fact that, while so returning, he rides in the postal car to assist the clerk in charge at the latter's request, does not change this relation.[3]

In Pennsylvania, however, a statute [4] provides that any person injured while lawfully engaged or employed on or about the premises or cars of a railroad company of which he is not an employé shall have only such rights against the company as if he were an employé, provided he is not a passenger. Under this statute, it has been held that a postal clerk riding in a mail car has not the rights of a passenger, but only those of a servant of the railroad company; that the rule of fellow servants applies; and that, if he is killed by the negligence of the train hands, there can be no recovery.[5]

[3] Cleveland, C., C. & St. L. Ry. Co. v. Ketcham, 133 Ind. 346, 33 N. E. 116.

[4] Act Pa. April 4, 1868 (P. L. p. 58); 2 Brightly's Purd. Dig. p. 1094.

[5] Pennsylvania R. Co. v. Price, 96 Pa. St. 256. On appeal to the United States supreme court, it was held that Rev. St. U. S. § 4000, which requires railroad companies to carry persons in charge of the United States mail on their trains, has no effect on the construction of the state statute, and that the decision of the state supreme court that the postal clerk has only the rights of an employé does not raise a federal question, so as to give the United States supreme court jurisdiction of the appeal. Price v. Railroad Co., 113 U. S. 218, 5 Sup. Ct. 427. The syllabus in this case in the official report is very misleading, as it represents the court as holding that the mail clerk is not a passenger.

§ 212. EXPRESS MESSENGERS.

An express messenger on a train, riding under a contract between the express company and the railroad company, is a passenger, and the location of the express car in the train does not deprive him of the benefit of that relation.[1] So, though an express messenger, by direction of the express company, also acts as baggage agent for the railroad company, he is not a servant of the railroad company, or a fellow servant with a brakeman on the train, so as to relieve the railroad company from liability for injuries caused by the negligence of the brakeman, where it appears that his wages were paid by the express company, and that it alone could discharge him, either as messenger or as baggage agent.[2] But one who rides on an express car, at the request of the express messenger, without authority from the officers of the express company, to learn the run, so that he may temporarily take the place of the express messenger, who intends to take a vacation, is not a passenger, nor entitled to the rights of a passenger.[3]

§ 212. [1] Brewer v. Railroad Co., 124 N. Y. 59, 26 N. E. 324; Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597; Yeomans v. Navigation Co., 44 Cal. 71; Pennsylvania Co. v. Woodworth, 26 Ohio St. 585; San Antonio & A. P. Ry. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839; Jennings v. Railway Co., 15 Ont. App. 477.

[2] Union Pac. Ry. Co. v. Kelley, 4 Colo. App. 325, 35 Pac. 923.

[3] Union Pac. Ry. Co. v. Nichols, 8 Kan. 505.

213. PORTER ON SLEEPING CAR.

It has been held by the supreme court of Missouri that a porter on a Pullman car, riding in that car and looking after the welfare of passengers therein, is not a servant of the railroad company, nor a fellow servant of the engineer and conductor, though, by his contract with the palace-car company and the contract between the latter and the railroad company, he is subject to the rules and regulations of the railroad company. The porter occupies the position of passenger in respect to the lawful running and management of the train.[1] On the other hand, the court of appeals of the District of Columbia has held that while a sleeping-car porter is not a servant of the railway company, within the meaning of the fellow-servant rule, yet he is not a passenger in any such sense as to require of the railroad company the highest degree of care and skill in the construction and maintenance of its roadway and machinery, and the operation of its road and the running of its trains. Nor will the principle apply that negligence is presumed prima facie from the simple fact of the occurrence of the accident and the infliction of injury, imposing the onus upon the defendant of showing the absence of negligence. But the onus of proof is upon plaintiff to show affirmatively that the injury he suffered was occasioned by the want of the exercise of ordinary, reasonable care by the defendant or its servants.[2]

§ 213. [1] Jones v. Railway Co., 125 Mo. 666, 28 S. W. 883.

[2] Hughson v. Railroad Co., 2 App. D. C. 98. Under these decisions,

§ 214. DROVER ACCOMPANYING STOCK.

A drover transported over a railroad on a pass for the purpose of taking care of his stock is not a servant of the railroad company, but a passenger.[1] He performs no duty on the train, is not connected in any manner with its management and operation, is not subject to the carrier's orders in that behalf, and owes no obedience, at least in the sense in which such duties commonly exist between master and servant.[2] But a stipulation in a bill of lading that the shipper designated in it may accompany the stock on the freight train, free of charge, can be availed of only by him. Another, though assisting the shipper, and claiming an interest in the stock, who, without procuring a ticket or tendering fare, also boards the train with the shipper, intend-

a railroad company occupies a very peculiar relation to these porters, for they are invariably held to be the servants of the railroad company in so far as to charge the company with liability for their torts to passengers. See post, § 347.

§ 214. [1] Flinn v. Railroad Co., 1 Houst. (Del.) 469; Little Rock & Ft. S. R. Co. v. Miles, 40 Ark. 298; Ohio & M. R. Co. v. Nickless, 71 Ind. 271; Receivers of International & G. N. Ry. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236. A drover riding on a freight train in charge of stock, with the consent of the railroad company, whether on a regular ticket or on a drover's pass, is a passenger; and the carrier owes him the same duty as to other passengers. New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809. The fact that a drover's pass contains a condition prohibiting minors from riding thereon does not deprive a 10 year old boy traveling on such a pass of any of the rights of a passenger, where the conductor received him on the train as a passenger, with knowledge of the facts. Texas & P. R. Co. v. Garcia, 62 Tex. 285.

[2] Carroll v. Railway Co., 88 Mo. 239.

ing to ride free, does not thereby become a passenger, but is a trespasser.[3]

It has been held, however, that a shipper of cattle, who, for the purpose of enabling him to care for his stock in transit, receives a drover's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire; but he takes passage under the implied condition that he will submit to whatever inconveniences are necessarily incident to his undertaking to look after the stock.[4] But a condition in a pass given to a shipper of stock that he shall be deemed an employé of the company while traveling with the stock, and that the liability of the company to him shall be that of master, is ineffectual to deprive him of the rights of a passenger, except as to

[3] Richmond & D. R. Co. v. Burnsed, 70 Miss. 437, 12 South. 958. So though he intends to pay fare when called upon. Gardner v. New Haven & N. Co., 51 Conn. 143. A shipper of stock and household goods employed plaintiff to accompany him, and take care of the property. Plaintiff rode in the box car with the stock, and paid his fare to the conductor. At the end of this conductor's division, the car was side tracked, and the next morning was placed in another train, in charge of a different conductor and crew. Plaintiff again got into the box car, without notifying any of the train hands, and they locked the car door in the usual manner, without knowledge of plaintiff's presence in the car. Later the goods caught fire from sparks from the locomotive, and plaintiff was burned before the door was opened. Held that, since plaintiff was riding in a box car without the knowledge of the train hands, the relation of carrier and passenger did not exist, and the fact that plaintiff had paid his fare, and that the conductor of the first train knew of his riding in the box car on the preceding day, does not alter the case. Jenkins v. Railway Co., 41 Wis. 112.

[4] Omaha & R. V. R. Co. v. Crow, 47 Neb. 84, 66 N. W. 21.

such risks and inconveniences as necessarily attend on caring for stock.[5]

§ 215. PERSON ENGAGED IN BUSINESS ON CARRIER'S VEHICLE.

As a general rule, one who, with the carrier's consent, goes upon its trains or boats to carry on a business for his own profit, is a passenger. Thus, one who rents a room on a steamboat at a stipulated monthly rental, for the purpose of selling liquor and cigars, and who is entitled to his carriage and board as part of the contract, is not an employé of the steamboat company, but a passenger, so far as the company's liability for injuries to him is concerned.[1] So, one who agrees to pay a railroad company a specified sum per annum, and to supply passengers on one of its trains with iced water, for the privilege of selling popped corn on its trains, and for free passage on its regular trains, is, while traveling on the railroad under this contract, a passenger, and not a servant of the railroad company.[2]

But a different rule prevails when one seeks to carry on his business in the carrier's vehicles without the

[5] Missouri Pac. Ry. Co. v. Tietken (Neb.) 68 N. W. 336.

§ 215. [1] Yeomans v. Navigation Co., 44 Cal. 71.

[2] Com. v. Vermont & M. R. Co., 108 Mass. 7. A newsboy who, with the implied permission of a street-car company, jumps on a street car to sell his papers to passengers, is not engaged or employed about the car, within the meaning of the Pennsylvania statute which makes a person so employed a fellow servant with the conductor, and the company is liable for injuries sustained by the boy by reason of the conductor's negligence. Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816.

carrier's knowledge and consent. Thus, a boy riding on a train from day to day, not as a passenger or employé, but by the connivance of the conductor, and in violation of the known rules of the company, in order to sell newspapers, is a trespasser on the train, and the company owes him no duty of care.[3] So, a newsboy who boards a street car to sell papers, without objection by the employés on the car, is, at most, a mere licensee or volunteer, and not a gratuitous passenger, and must take the car as he finds it.[4]

§ 216. PERSON ASSISTING CARRIER'S SERVANT.

It is generally held that one who voluntarily undertakes to perform service for another, or to assist the servants of another in the service of the master, either at the request or without the request of such servants, who have no authority to employ other servants, is a volunteer or intermeddler, to whom no duty of care is due. Thus one who goes on a train to assist the brakeman, at the request of the conductor or other train hands, is a trespasser, if the conductor had no express authority to employ him, and there was no exigency which called for the exercise of implied au-

[3] Duff v. Railroad Co., 91 Pa. St. 438.

[4] Blackmore v. Railway Co., 38 U. C. Q. B. 172; North Chicago St. Ry. Co. v. Thurston, 43 Ill. App. 587. In an action for injuries to a newsboy while attempting to take passage in an elevator, it is competent to show that plaintiff was notified of the fact, prior to the accident, that newsboys were not allowed in the elevator, and that he could not do so, since in that event he would be a mere trespasser. Springer v. Byram, 137 Ind. 15, 36 N. E. 361.

thority.[1] So, one who rides on a locomotive engine under an agreement with the fireman that he is to shovel coal in consideration for his ride, but without the knowledge of the conductor in charge of the train, is not a passenger, but a trespasser engaged in an attempt to defraud the company.[2]

But, in the case of a bona fide passenger, the fact that he undertakes to assist the carrier's servants does not necessarily terminate the relation. Thus, a passenger on a street car, who, at the driver's request, assists in pushing the car on a side track, so as to enable another car to pass, is, while so engaged, still a passenger, and is neither a servant of the company nor a trespasser or volunteer.[3] So the relation of carrier and passenger is not terminated by the fact that the passenger alights from the train, and aids the carrier's servants in identifying and removing his baggage, nor does the act of so doing make him a servant of the carrier.[4]

§ 216. [1] Railroad Co. v. Dial, 58 Ark. 318, 24 S. W. 500; Cooper v. Railroad Co., 136 Ind. 366, 36 N. E. 272; Everhart v. Railroad Co., 78 Ind. 292.

[2] Woolsey v. Railroad Co., 39 Neb. 798, 58 N. W. 444.

[3] Street Ry. Co. v. Bolton, 43 Ohio St. 224, 1 N. E. 333. But it has been held that one who voluntarily undertakes to perform a service while on a train that he is under no obligation to perform, although undertaken at the request of the foreman of the train gang, becomes a fellow servant with the engineer and fireman, and, if injured by their negligence, cannot recover. Texas & N. O. Ry. Co. v. Skinner, 4 Tex. Civ. App. 661, 23 S. W. 1001.

[4] Ormond v. Hayes, 60 Tex. 180.

§ 217. CARRIER'S EMPLOYES.

Some conflict of authority exists on the question whether an employé of the carrier, while being carried to and from his work, is to be regarded as a passenger or as a servant. The decided weight of authority, however, is in favor of the proposition that an employé of a railroad company, who travels back and forth from his home to the place where his services are rendered, on the cars of the company, free of charge, as stipulated for in the contract of employment, is a servant of the company, and not a passenger, while so traveling, and for an injury to him through the negligence of a co-employé the company is not liable.[1] So, the traveling au-

§ 217. [1] Vick v. Railroad Co., 95 N. Y. 267; Russell v. Railroad Co., 17 N. Y. 134; Gilman v. Railroad Co., 10 Allen (Mass.) 233; Gillshannon v. Railroad Co., 10 Cush. (Mass.) 228; Moss v. Johnson, 22 Ill. 633; Tunney v. Railway Co., L. R. 1 C. P. 291. A painter employed by a railroad company to paint depots, bridges, tracks, and switches along the line of the road is an employé, and not a passenger, while being transported over the road to discharge the duties of his employment. McQueen v. Railroad Co., 30 Kan. 689, 1 Pac. 139. A locomotive engineer, riding free on a freight train from his home to the end of a division to take charge of his engine, is not a passenger, but an employé. Kansas Pac. Ry. Co. v. Salmon, 11 Kan. 83. A sectionman of a street-railway company, whose custom is to furnish such employés transportation to and from their work, is not a mere trespasser while riding on one of its cars by order of his foreman, but is lawfully on the car, though not a passenger. Denver & B. P. Rapid-Transit Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106. A railroad employé, hired by the month, was directed to go to a certain station, and there take charge of a gravel train the next day. Instead of stopping at the point designated, he passed it, and stopped overnight at his home,—a station beyond. On returning the next morning, he was injured by the negligence of the train hands. Held

ditor of a railroad company, whose duties are to travel on the company's cars from station to station on its road, and audit accounts, is, while so traveling, a servant of the company, and not a passenger.[2] So, one who travels on a railroad train on a free ticket issued to him as an agent of the company is not a passenger, but an employé of the company, and the principle governing the master's liability for injuries caused by the negligence of a fellow servant applies to him.[3] So, an employé who uses an elevator in the employer's building, while going to and from her work, is still a servant, and not a passenger, and the employer is bound to use only ordinary care for her safety.[4] So, a laundress, while being conveyed, either gratuitously or as part of the contract of employment, from her house to that of her employer, in his wagon, is a fellow servant of the coachman, and cannot recover for an injury caused by

that, while so traveling, he was a servant of the railroad company, and not a passenger, and hence the railroad company is not liable for the negligence of his co-servants. Manville v. Railroad Co., 11 Ohio St. 417.

[2] Minty v. Railroad Co., 2 Idaho, 438, 21 Pac. 660.

[3] Central R. Co. v. Henderson, 69 Ga. 715, reaffirmed in Henderson v. Railroad, 73 Ga. 718. In an earlier case, however, it was held that a workman, employed as a track laborer on a railroad, is to be regarded, not as an employé, but as a passenger, while being carried on a train from the place of his work to where he stays at night. Atlanta & R. Air-Line Ry. Co. v. Ayers, 53 Ga. 12. This decision was influenced by several provisions of the Georgia Code. Section 2083 renders railroad companies liable for injuries to servants caused by the negligence of fellow servants; section 3036 bars a recovery by an employé guilty of negligence; but section 3034 permits a recovery by a passenger guilty of negligence.

[4] McDonough v. Lanpher, 55 Minn. 501, 57 N. W. 152.

his negligence.[5] The fact that the conductor of a train receives and treats a person riding therein as a passenger does not make him a passenger, if in fact he is a servant of the company.[6]

In Pennsylvania and Indiana, however, a different rule prevails, and it is held in these states that an employé of a railroad company is a passenger while being carried to and from his work,[7] especially where he hires out at a less price per day than if he had been required to pay fare.[8] It has also been held that a railroad company which invites a station agent on board of its pay train to receive his wages must exercise the same degree of care and diligence for his safety, while on or leaving its train, as if he were a passenger.[9] So, it has been held that a detective, employed by a railroad company to ferret out thefts from its cars, is to be regarded as a passenger, rather than as an employé, while being carried from station to station in connection with his business.[10]

It is agreed on all hands, however, that an employé of a railroad company, entitled to ride free, whether in the service of the company or on his own private busi-

[5] McGuirk v. Shattuck, 160 Mass. 45, 35 N. E. 110.

[6] Texas & P. Ry. Co. v. Scott, 64 Tex. 549.

[7] Gillenwater v. Railroad Co., 5 Ind. 339; Fitzpatrick v. Railroad Co., 7 Ind. 436.

[8] O'Donnell v. Railroad Co., 59 Pa. St. 239, 50 Pa. St. 490. In Downey v. Railway Co., 28 W. Va. 732, an employé of a railroad company, transported to its machine shops on a work train, with other employés, in consideration of his employment, was treated as a passenger without discussing the question.

[9] Louisville & N. R. Co. v. Stacker, 86 Tenn. 343, 6 S. W. 737.

[10] Pool v. Railway Co., 53 Wis. 657, 11 N. W. 15.

ness or pleasure, is a passenger, and not a servant, while so traveling on his own private business, when his time is his own.[11] Thus, a brakeman who has been released from duty on a Saturday night, and who, with the conductor's permission, undertakes a journey on that day to visit his family at the other end of his "run," is not an employé of the company while so traveling, but a passenger, and hence the company is liable for injuries sustained by him through the negligence of its servants.[12]

It has also been held that an employé of a railroad contractor, transported on a train furnished by the railroad company to carry the contractor's employés

[11] Doyle v. Railroad Co., 162 Mass. 66, 37 N. E. 770; McDaniel v. Railroad Co., 90 Ala. 64, 8 South. 41.

[12] State v. Western Md. R. Co., 63 Md. 433. In this case, the court, after reviewing the cases, says: "In whatever else they may differ, these cases all agree upon one principle, and that is that if the plaintiff is not at the time of the accident engaged in the actual service of the company, or in some way connected with such service, the company is liable for the negligence of its employés." A day yard master, after being relieved from duty at 6 p. m., took a passenger car and engine to give himself and fellow servants a free ride to and from a public meeting, without notice or permission from any officer who had authority to permit the passage of such a train. Held, that such act not having been done in the course of his employment, but for his own ends exclusively, and without real or apparent authority to carry passengers for the company, the company was not liable as to a passenger for injury to one on the train. Chicago, St. P., M. & O. Ry. Co. v. Bryant, 13 C. C. A. 249, 65 Fed. 969. On a prior appeal in this case, it was held to be a question of fact for the jury whether employés of a railroad company, carried free of charge, on a special train, from its shops to a depot, two miles away, for the purpose of attending a public meeting, are passengers in going and returning. Bryant v. Railway Co., 4 C. C. A. 116, 53 Fed. 997. But see, contra, Davis v. Railroad Co., 45 Fed. 743.

from their place of residence to their work, and back again, and operated by the servants of the railroad company, is a passenger lawfully on the train, and not a fellow servant with the train hands.[13]

§ 218. SOLDIERS.

A soldier in the regular army, transported on a special train, under a contract with the railroad company and the federal government, is a passenger while being so transported, so far as the company's duty to exercise care for his safety is concerned, though it merely furnishes the motive power and the crew to operate the train.[1] But a soldier who is being transported by vessel under such a contract is not a passenger, even after his discharge from the service during the voyage, in such a sense as to render the master of the vessel liable for his ill treatment by the commanding officer of

[13] Torpy v. Railway Co., 20 U. C. Q. B. 446. But where a car furnished by a railroad company for the transportation of its own employés is also used, as matter of convenience, by a contractor and his employés in going to and from their work, an employé of the contractor cannot be regarded as a passenger, though the company acquiesced in such use of the car. He is a licensee, to whom the company is responsible only for wanton and intentional injury. McCauley v. Railroad Co., 93 Ala. 356, 9 South. 611. A laborer in the employ of a lumber company, engaged in loading and unloading cars hauled by a railroad company, is not to be deemed a trespasser in riding on a train made up of such cars, with the consent or permission of the conductor, and hence he is not debarred from recovering for an injury inflicted by the negligence of the railroad company while so riding. Gradin v. Railway Co., 30 Minn. 217, 14 N. W. 881.

§ 218. [1] Galveston, H. & S. A. Ry. Co. v. Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64; Truex v. Railway Co., 4 Lans. (N. Y.) 198.

the troops;[2] nor is he a passenger within the meaning of the rule which denies compensation to passengers for salvage services.[3]

§ 219. SLAVES.

In the days of slavery, a question arose whether a common carrier's liability in the transportation of slaves was that of an insurer, as in the case of other property, or whether he was liable only for negligence, as in the case of passengers. It was uniformly held that slaves, in this respect, were to be treated as passengers, and not as property.[1] "A slave's transportation, by land or water, is not paid for either by weight or measurement. He is not stowed away as goods. He eats and sleeps and has locomotion, and must be provided for accordingly. These attributes, however, do not elevate him above the brute, which stands in a stall or secured in a cage. He has, however, reason. In this respect, however degraded his caste, he is far elevated above the brute creation; and, as a man, he is to be carried and treated far differently from goods or brutes. He is therefore paid and cared for as a passenger, and it is in this character that the carrier's liability is assumed and is to be enforced."[2]

[2] White v. McDonough, 3 Sawy. 311, Fed. Cas. No. 17,552.

[3] The Merrimac, 1 Ben. 201, Fed. Cas. No. 9,473.

§ 219. [1] Boyce v. Anderson, 2 Pet. 150; Clark v. McDonald (1827) 4 McCord (S. C.) 223; Folse v. Transportation Co., 19 La. Ann. 199; Mitchell v. Railroad, 30 Ga. 22.

[2] McClenaghan v. Brock, 5 Rich. Law (S. C.) 17, citing Sill v. Railroad Co., 4 Rich. Law (S. C.) 151.

§ 220. PERSONS ENGAGED IN ILLEGAL ACTS—SUNDAY TRAVEL.

It is now well settled that a carrier, by its acceptance of a passenger as a passenger, comes under an obligation to take due and reasonable care for his safety, which obligation arises by implication of law, and independent of contract, so that it may exist though the contract of carriage is illegal, or though there is no express contract of carriage.[1] Hence the fact that a contract of carriage is entered into on Sunday, and that plaintiff, when injured, was traveling on Sunday, in violation of a statute, does not preclude him from maintaining an action against the carrier for the injuries.[2] In the language of the New York court of appeals, "it is certainly a startling proposition that the thousands and tens of thousands of persons who travel on business or for pleasure on Sunday, upon railroads and steam and ferry boats in this state, are at the mercy of incompetent or careless engineers and servants, and that there is no remedy for loss of life or limb resulting from this negligence." [3]

§ 220. [1] New York, L. E. & W. R. Co. v. Ball, 53 N. J. Law, 283, 21 Atl. 1052.

[2] Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. Law, 169, 19 Atl. 178; Knowlton v. Railway Co., 59 Wis. 278, 18 N. W. 17; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575; The D. S. Gregory, 2 Ben. 226, Fed. Cas. No. 4,100. The provision of the statute (Revision N. J. p. 1227) prohibiting Sunday travel, which renders it lawful for railroad companies to run one passenger train over their roads each way on Sunday, makes it lawful for persons to travel on those trains. Smith v. Railroad Co., 46 N. J. Law, 7.

[3] Carroll v. Railroad Co., 58 N. Y. 126, affirming 65 Barb. (N. Y.) 32.

In Massachusetts, however, it was at one time held that a passenger traveling on Sunday, not from necessity or charity, in violation of statute, cannot recover for injuries caused by the carrier's negligence while so traveling.[4] But the statute [5] which prohibits traveling on the Lord's day, except from necessity or charity, has been amended so as to provide that "this section shall not constitute a defense to an action against a common carrier of passengers for a tort or injury suffered by the person while so traveling." [6] So, in Con-

[4] Stanton v. Railroad Co., 14 Allen (Mass.) 485. But one who travels on Sunday to visit a sick friend is traveling for "charity," within the meaning of the Lord's day act (Gen. St. Mass. c. 84, §§ 1, 2), which prohibits traveling on that day, "except from necessity or charity." Doyle v. Railroad Co., 118 Mass. 195. So, the facts that the exercises of a Spiritualist camp meeting included a show to which an admittance fee was charged, and that some of the speakers declared that they would throw away the Bible in their search after truth, are not conclusive that a person who traveled on the Lord's day to attend the meeting did so unlawfully; but the question whether she did so from necessity or charity, within the exception of the act, is for the jury. Feital v. Railroad Co., 109 Mass. 398. In Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. 974, it was held that the decisions of the supreme judicial court of Massachusetts that the statute prohibiting Sunday travel, except in cases of necessity or charity, will preclude a person from recovering against a railroad company for injuries sustained through the negligence of its servants, while traveling in violation of this statute, are binding on the federal courts; and, though such a construction is believed to be wrong by the federal supreme court, yet a person injured in Massachusetts while traveling on the Lord's day cannot recover in the federal courts.

[5] Pub. St. Mass. c. 98, § 3.

[6] McDonough v. Railroad Co., 137 Mass. 210. Traveling on Sunday is no defense to the carrier for personal injuries, since the statute expressly excludes that defense. Jordan v. Railway Co., 165 Mass. 346, 43 N. E. 111.

necticut, the statutes, since 1883, do not prohibit Sunday travel; and an action lies against a street-railroad company for negligence resulting in an injury to a passenger riding for pleasure on a Sunday, though Gen. St. Conn. § 1569, still prohibits any person from engaging in "any sport or recreation on Sunday, between sunrise and sunset." [7]

So, it has been held that the fact that a free pass was given in violation of law does not make the person riding thereon a trespasser, or destroy his right, as a passenger, to recover for injuries caused by the carrier's negligence.[8]

In some of the Southern states, however, during reconstruction days, it was held that one engaged in the Confederate military service, injured by the carrier's negligence while traveling from place to place, could not recover against the carrier, on the ground that he was engaged in an illegal act, to wit, rebellion against the United States.[9] The judges composing these courts were probably a great deal stronger as patriots than as lawyers, and these decisions are so obviously unsound as to require but little comment. Whatever the passenger's purpose may be on arriving at his destination, the act of traveling is certainly not

[7] Horton v. Tramway Co., 66 Conn. 272, 33 Atl. 914.

[8] Buffalo, P. & W. R. Co. v. O'Hara, 3 Penny. (Pa.) 190.

[9] Martin v. Wallace, 40 Ga. 52; Wallace v. Cannon, 38 Ga. 199; Muscogee R. Co. v. Redd, 54 Ga. 33, 48 Ga. 102; Turner v. Railroad Co., 63 N. C. 522. In this last case it was said: "The act of going to the field of operations was illegal, and the contract of the defendant to aid him by carrying him to the field was an illegal contract; and, upon the supposition that both parties were rebels,—the most favorable one for the plaintiffs,—there can be no recovery upon it."

illegal. And even if it were, under the principle of the "Sunday cases," it cannot be considered as the proximate cause of his injuries, which are directly attributable to the negligence of the carrier.

§ 221. PREPAYMENT OF FARE.

The purchase of a ticket or the prepayment of fare is not necessary to constitute the relation of passenger and carrier. Taking a seat in a vehicle provided by the passenger for the transportation of passengers, with the intention of paying fare on demand, is all that is necessary.[1] Common carriers have the right to demand of passengers, applying for transportation, prepayment of fare; but, in the absence of such demand, the failure to pay fare does not release the carrier from his obligation to the passenger. In such a case it is presumed that the carrier relies on the integrity and responsibility of the passenger, or on its lien on his baggage.[2] So, one who procures a ticket at a station

§ 221. [1] Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494, 15 S. E. 848; Florida South. Ry. Co. v. Hirst, 30 Fla. 1, 11 South. 506; Cleveland, C., C. & St. L. R. Co. v. Best, 68 Ill. App. 532; Stoner v. Pennsylvania Co., 98 Ind. 384; Norfolk & W. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454; Houston & T. C. R. Co. v. Washington (Tex. Civ. App.) 30 S. W. 719.

[2] Hurt v. Railroad Co., 40 Miss. 391. A contract is implied, where one takes passage with a common carrier, that he shall pay a reasonable price or reward for being carried, and that the carrier shall exercise due care, diligence, and skill in transporting him safely and speedily to the journey's end; and it is not necessary to prove an express contract or the actual payment of the reward. Frink v. Schroyer, 18 Ill. 416. When a person is on a train as a passenger, the only inquiry is whether he is lawfully there, and not whether he

on his promise to pay the agent therefor on his return, there not being time before the starting of the train, and who thereafter makes such payment, is to be treated as a passenger while on the train.[3] So, the mere fact that a person riding on a regular passenger train leaves his car without surrendering his ticket or paying his fare, not having had an opportunity so to do, does not establish, as matter of law, that he is not a passenger, and not entitled to protection as such, on leaving the car; since it cannot be assumed that he intended to evade payment of fare, or left the car for that purpose.[4] So, one who gets on a street car for the purpose of becoming a passenger, expecting and willing to pay fare, is a passenger, though the conductor, owing to the crowded condition of the car, may fail to collect fare from him.[5] So, one who enters on a passenger steamboat, in good faith, to take passage thereon, is there in the relation and character of a passenger; and the owner of the boat owes to him the duty of a carrier of passengers, although no fare has been paid.[6]

had paid his money for the privilege. Ohio & M. R. Co. v. Muhling, 30 Ill. 9.

[3] Ellsworth v. Railway Co. (Iowa) 63 N. W. 584.

[4] McKimble v. Railroad, 139 Mass. 542, 2 N. E. 97. The wife of a railroad employé, traveling, without a ticket and without a pass, to the point where her husband is at work, is not a trespasser, so as to be withdrawn from the protection of the law applicable to passengers, although, before she boarded the train, the conductor stated to her that he could not take her without a pass, but that she was entitled to one. Galveston, H. & S. A. Ry. Co. v. Sneed, 4 Tex. Civ. App. 31, 23 S. W. 277.

[5] Cogswell v. Railway Co., 5 Wash. 46, 31 Pac. 411.

[6] Cleveland v. Steamboat Co., 68 N. Y. 306, reversing 5 Hun, 523.

It is also entirely immaterial from what source the carrier is compensated,—whether by the passenger or by some one else. This fact has clearly appeared in the preceding sections, touching the carrier's duties to postal clerks, express agents, etc. So, where a society hires a special train from a railway company for the purpose of an excursion, one who buys a ticket from the treasurer of the society is a passenger, and the railway company is bound to use due care in his transportation.[7]

§ 222. SAME—FRAUD ON CARRIER.

A very different rule, however, obtains when it appears that a person is fraudulently seeking to evade the payment of fare. "The rule is well settled that when one gets on a passenger train, with the deliberate pur-

Where a 10 year old child pays her fare one way in getting on a ferryboat, and does not leave the boat at all, the failure to demand or pay fare on the return does not preclude a recovery for injuries sustained on the return trip by reason of the negligence of the ferry company's employés. Doran v. Ferry Co., 3 Lans. (N. Y.) 105. The failure of a passenger on a ferryboat to pay fare does not relieve the carrier from liability for injuries during the trip, since she may have intended to pay, and may have had no proper demand made on her. Bartlett v. Transportation Co. (Super. N. Y.) 8 N. Y. Supp. 309, affirmed 130 N. Y. 659, 29 N. E. 1033. One who, after boarding a steamer, learns that a certain landing where he intends to stop is off the steamer's route, and that he must pay extra fare in order to stop there, and who declines to do so, but does not change his purpose of taking passage, is a passenger from the time he goes on board, and, as such, can hold the steamer responsible for negligence whereby he is injured, though he does not prepay his fare or purchase a ticket; it being the custom for the purser to collect fares on board. The Wasco, 53 Fed. 546.

[7] Skinner v. Railway Co., 5 Exch. 787.

pose not to pay fare, and adheres to that purpose, or if, being on the train, and having money with which he could pay his fare, he falsely and fraudulently represents to the conductor that he is without the means to pay his fare, and, by means of such fraudulent representations, induces the conductor to permit him to remain on the train without payment of fare, the relation of carrier and passenger, and the obligations resulting from that relation, are thereby not established between him and the company, and the company owes him no other duty than not to willfully or recklessly injure him. * * * The law will do nothing to stimulate fraud and dishonesty, and that would be the effect of holding that a railroad company owed to one riding on the train, under the conditions named, the duties and obligations it owes to a passenger who has honestly paid his fare. Railroad companies are as much entitled to protection against fraud as natural persons. It is a matter of common knowledge, of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. They are not eleemosynary agencies. It is equally well known that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare. But, if he had such authority, his assent obtained by the fraudulent means mentioned would confer no rights. One riding on a train by fraud or stealth, without the payment of fare, takes upon himself all the risks of the ride; and if injured by an accident happening to the train, not due

to recklessness or willfulness on the part of the company, he cannot recover." [1] So, one who clandestinely enters a locomotive [2] or a freight car,[3] to beat his way over the road, is a trespasser, and the only duty the company owes him is not to wantonly injure him. The same rule applies to one who pays a brakeman, for his own personal use, a sum less than the regular fare, for permission to ride in a freight car.[4] So, where a per-

§ 222. [1] Caldwell, J., in Condran v. Railway Co., 14 C. C. A. 506, 67 Fed. 522. To the same effect, see North Birmingham Ry. Co. v. Liddicoat, 99 Ala. 545, 13 South. 18; McVeety v. Railway Co., 45 Minn. 268, 47 N. W. 809; Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245. The fact that a person furnishes the conductor with liquor, in order to get his consent to ride on a freight train which he knows does not carry passengers, gives him no rights as a passenger. Hoehn v. Railroad Co., 52 Ill. App. 662. One who rides on a mixed passenger and freight train, without payment of fare, by the invitation and permission of the conductor, is not a passenger. Conductors and employés in charge of a train are not clothed with authority to invite persons to take passage with them as their guests, and especially is this true of conductors and employés of freight trains. Nor does the fact that plaintiff was rendering services on defendant's train as brakeman, with the acquiescence, knowledge, consent, and permission of the conductor, render him a servant of defendant, so as to entitle him to recover damages as such for injuries caused by defendant's negligence. Stalcup v. Railway Co. (Ind. App.) 45 N. E. 803. But the fact that a mother does not take a ticket for her child, three years and two months old, traveling with her, does not prevent the child from recovering for injuries sustained in an accident on the journey, though a statute requires all children over three years old to pay half fare, there being no intention on the part of the mother to defraud the company. Austin v. Railway Co., L. R. 2 Q. B. 442.

[2] Chicago & A. R. Co. v. Michie, 83 Ill. 427.

[3] Hendryx v. Railroad Co., 45 Kan. 377, 25 Pac. 893; St. Louis, I. M. & S. Ry. Co. v. Ledbitter, 45 Ark. 246; Planz v. Railroad Co., 157 Mass. 377, 32 N. E. 356.

[4] Janny v. Railway Co., 63 Minn. 380, 65 N. W. 450; McNamara v.

son, without the knowledge of the conductor, gets into the caboose of a freight train, after his application for permission to ride has been denied by the conductor, the fact that the conductor, from motives of humanity, does not eject him in the nighttime, after discovering his presence in the caboose, does not constitute him a passenger, so as to render the company liable for his death in an accident caused by a defect in the car.[5] And one who enters a stagecoach, and declines to pay fare when requested, and who is notified to leave the coach, but who continues therein, with a threat that he will resist expulsion, is a trespasser, and not a passenger, and the carrier is not liable for injuries caused by its negligence.[6]

§ 223. SAME—FRAUDULENT USE OF PASS OR TICKET.

One who fraudulently attempts to ride on a nontransferable pass or commutation ticket issued to another is not a passenger to whom the carrier owes the duty to carry safely.[1] This rule is founded on sound principle, since it is a fundamental doctrine of law that one who is guilty of a fraud cannot enforce any

Railway Co., 61 Minn. 296, 63 N. W. 726; Atchison, T. & S. F. R. Co. v. Johnson, 3 Okl. 41, 41 Pac. 641. One who bribes a freight brakeman to permit him to ride among the freight in the freight car is not a passenger, but a trespasser. Brevig v. Railway Co., 64 Minn. 168, 66 N. W. 401.

[5] Atchison, T. & S. F. R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185.

[6] Higley v. Gilmer, 3 Mont. 90.

§ 223. [1] Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, and 9 N. E. 357; Way v. Railway Co., 64 Iowa, 48, 19 N. W. 828; Handley v. Railroad Co. (Tex.) 2 Posey, Unrep. Cas. 282.

rights arising out of his own wrong. It is also in close agreement with the rule that a carrier owes no duty of care towards an intruder.[2] But if a passenger, in good faith, and without attempt to conceal his identity, present for his passage a nontransferable commutation ticket issued to another, and his claim is recognized, and he is carried as a passenger, he is entitled to the right of a passenger to be carried safely, and to have a safe place to alight and leave the road.[3] So, the mere fact that a nontransferable pass issued to another person is found on the body of a dead passenger after an accident does not raise a conclusive presumption that the dead man was wrongfully using the pass, and hence not a passenger. The carrier should produce some evidence that the pass was being fraudulently used, since the presumption always is in favor of honesty and fair dealing, and he who asserts the contrary must prove it.[4]

2 Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, and 9 N. E. 357.

3 Robostelli v. Railroad Co., 33 Fed. 796. A railway company was in the habit of issuing gratuitous tickets to the reporters of a London newspaper when going to report certain country races. The tickets were nontransferable. Plaintiff, a reporter, acting bona fide, and going on the business of his journal, went to the station with such a ticket. His name, however, was not upon it, but that of another reporter in the same department with himself. While on the journey, plaintiff was injured, and the company sought to evade liability, on

4 Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, and 9 N. E. 357. The mere fact that a person named "Rice" is traveling on a pass issued to "Price" does not warrant the court in declaring, as a matter of law, that she was practicing a fraud on the company, but the question is for the jury. Rice v. Railroad Co., 22 Ill. App. 643.

§ 224. PERSON RIDING IN DANGEROUS OR PROHIBITED PLACE.

A passenger on a train or boat designed for the transportation of passengers does not lose his character as such by negligently assuming a dangerous position. He may thereby, in case of injury, subject himself to the imputation of contributory negligence, barring a recovery for the injury produced by the negligence of the carrier, but he is a passenger still.[1] Thus, a pas-

the ground that he was not lawfully on the train. Held, that evidence that other reporters had, on several occasions before, traveled with similar tickets not bearing the names of those who used them, and that the persons whose names were on the tickets were personally known to some of the officers and servants at the station, was sufficient to take the question to the jury. Great Northern Ry. Co. v. Harrison, 10 Exch. 375.

§ 224. [1] Brown v. Scarboro, 97 Ala. 316, 12 South. 289. The supreme court of the United States has said: "The fact that a passenger occupies a position on a vehicle which he is not entitled to under the contract of carriage does not dissolve the relation of passenger and carrier. Such violation only gives the carrier the right to compel him to conform to the regulation, or, upon his refusing to do so, to require him to leave the boat, using, in either case, only such force as the circumstances reasonably justified. If the injuries necessarily arose from the violation of the regulation, the carrier would not be responsible therefor. But if they were not the necessary result of his being, at the time, on a part of the boat where he had no right to be, and were directly caused by the improper conduct of the carrier's servants, either while acting within the scope of their general employment, or when in the discharge of special duties imposed on them, he is not precluded from claiming the benefit of safe transportation." New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, affirming 18 Fed. 156. As to contributory negligence in riding in dangerous or prohibited places, see ante, §§ 167–177.

senger who goes into the baggage compartment of a combination smoking and baggage car does not become a trespasser, but remains a passenger, though a rule of the company forbids passengers from riding in the baggage compartment, where it appears that the smoking compartment was filled with passengers, that plaintiff was not aware of the rule, and that defendant's employés had repeatedly permitted plaintiff and other passengers to ride in the baggage compartment.[2] So, one who, holding a pass good for transportation over a railroad, boards the baggage car of a moving train, and, finding the car door locked, rides on the platform of the car, is a passenger.[3] So, where a freight car is attached to a passenger train, with the agreement that the owner of the freight is to operate the brakes thereon, and run all risks, the owner is entitled to the rights of a passenger, so far as injury to him is concerned, though there is a regulation of the company against running freight with passenger cars.[4] So, the

[2] New York, L. E. & W. R. Co. v. Ball, 53 N. J. Law, 283, 21 Atl. 1052. The fact that a soldier on a special train, transported under a contract between the company and the federal government, is detailed to ride in the baggage car, to take charge of baggage and rations being transported on the train, does not change his relation of passenger. Galveston, H. & S. A. Ry. Co. v. Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64.

[3] Illinois Cent. R. Co. v. O'Keefe, 63 Ill. App. 102.

[4] Lackawanna & B. R. Co. v. Chenewith, 52 Pa. St. 382. A cattle drover, whose cattle were being transported on a train containing nothing but box cars, rode on the engine, with the consent of the company's employés, and was injured by the derailment of the engine. Held that, though the company's rule forbade persons riding on the engine, yet the company was liable if the drover was ignorant

fact that a person, after paying his fare, rides on the steps on the front platform of a street car does not sever the relation of passenger and carrier, and he does not thereby forfeit his right to exact the same care of the carrier that he would have been entitled to exact if he had taken his place inside the car.[5]

A different principle, however, applies when one takes an exposed position on a train, with or without the knowledge or consent of the carrier's servants, for the purpose of obtaining a gratuitous ride. In such a case he is committing a fraud on the carrier, and will be treated as a trespasser, and not as a passenger.[6] Thus, a brakeman who has been off duty for several days, and who gets on the baggage car of a passenger train on a journey for his own private ends, and who pays no fare, is not a passenger, where he knows that the rules of the company forbid persons from riding in the baggage car.[7] So, one who rides, without the knowledge of the railway company's employés, in a car devoted to the railway mail service,[8] or who rides on the front platform of the express car,[9] or on the loco-

of the rule, and if the company had by its conduct held out its employés as authorized to consent to the carrying of drovers on the engine. Waterbury v. Railroad Co., 17 Fed. 671.

[5] Willmott v. Railway Co., 106 Mo. 535, 17 S. W. 490.

[6] See ante, § 222.

[7] Higgins v. Railroad Co., 36 Mo. 418.

[8] Bricker v. Railroad Co., 132 Pa. St. 1, 18 Atl. 983.

[9] Ohio & M. Ry. Co. v. Allender, 59 Ill. App. 620. One so riding does not become a passenger by paying to the brakeman the fare demanded. Chicago & E. R. Co. v. Field, 7 Ind. App. 172, 34 N. E. 406.

motive,[10] or on the footboard of the engine,[11] with the knowledge or at the invitation of the engineer, or even of the conductor, is not a passenger, but a trespasser, if his purpose is to obtain a gratuitous ride.

§ 225. PERSONS ON FREIGHT TRAINS.

As to the status of a person riding on a freight train, there is some conflict in the authorities. In considering the subject, it will be convenient to take up—First, the cases where it appears that a railroad company has made a complete separation between its passenger and freight business; and, second, cases where it appears that the company permits passengers to ride on some of its freight trains, and prohibits them from doing so on others.

There can be no question that railroad companies have the right to make a complete separation between their freight and passenger business. When such a separation has been made, the conductor of a freight train has no power, real or apparent, to accept passengers on freight trains, and his consent to a person's riding on his train will not make that person a

[10] Virginia M. R. Co. v. Roach, 83 Va. 375, 5 S. E. 175; Robertson v. Railroad Co., 22 Barb. (N. Y.) 91. One who attempts to get into the cab of a locomotive engine attached to a freight train on a railroad used exclusively for freight, to ride for his own convenience, by invitation of the conductor of the train, does not acquire the rights of a passenger, even if he has previously ridden in the locomotive by a similar invitation, and has seen the servants of the corporation do so. Files v. Railroad Co., 149 Mass. 204, 21 N. E. 311.

[11] Wilcox v. Railway Co. (Tex. Civ. App.) 33 S. W. 379; Barkley v. Railway Co., 37 Ill. App. 293.

passenger, or render his presence on the train lawful, so as to make the company liable for injuries caused by negligence.[1] But although a railway company may not authorize the carriage of passengers on its freight trains, or may prohibit it, yet if its servants carry passengers on such trains to the knowledge of the company's officers, authorized to make and enforce rules, or if it is carried to such an extent that such officers, in a proper discharge of duty, should know the facts, and no effort is made to stop it, then a passenger is authorized to presume that it is permitted by the company, and will be protected as a passenger on such trains. But it cannot be said that a disobedience of orders can annul an order, except upon the principle that the officers, knowing of the violation, ratify it. Whatever falls short of this will not serve to confer authority upon or enlarge the powers of the agent.[2] In some cases, however, it is held that, even though the rules of a railroad company prohibit the transportation of passengers on freight trains, yet one

§ 225. [1] Eaton v. Railroad Co., 57 N. Y. 382; Powers v. Railroad Co., 153 Mass. 188, 26 N. E. 446; San Antonio & A. P. Ry. Co. v. Lynch, 8 Tex. Civ. App. 513, 28 S. W. 252; St. Louis S. W. Ry. Co. v. White (Tex. Civ. App.) 34 S. W. 1042. A brakeman employed on a freight train in charge of a conductor has no implied authority to bind the company by a contract of passage, and his permission to a person to ride does not make such person a passenger. Candiff v. Railway Co., 42 La. Ann. 477, 7 South. 601.

[2] Texas & P. Ry. Co. v. Black, 87 Tex. 160, 27 S. W. 118; Burke v. Railway Co., 51 Mo. App. 491. The testimony of freight conductors on a railroad that they had, contrary to rule, themselves ridden on freight trains without a pass, and had permitted former employés of the railroad to so ride, is, in the absence of knowledge thereof on the part of the officers of the company, insufficient to

who enters the caboose attached to such a train, and remains in it with the knowledge of the conductor, and pays the usual fare, is entitled to protection as a passenger, unless it is shown that he had knowledge of the rule.[3]

Where, however, a railroad company has adopted the system of carrying passengers on some of its freight trains,—the usual system in the Western states, at least,—one who goes on a freight train in good faith, supposing it to be also a train for carrying passengers, is entitled to all the rights and remedies of a passenger as against the company, though the conductor of that particular train is prohibited from carrying passengers.[4] These decisions rest on the princi

establish a custom which will entitle an ex-employé so riding to the rights of a passenger. Powers v. Railroad, 153 Mass. 188, 26 N. E. 446.

[3] Dunn v. Railway Co., 58 Me. 187; Hanson v. Transportation Co., 38 La. Ann. 111; Wagner v. Railway Co., 97 Mo. 512, 10 S. W. 486; McGee v. Railway Co., 92 Mo. 208, 4 S. W. 739. In Dunn v. Railway Co., 58 Me. 187, it is said: "The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their conduct while in its employment. It alone has the right and the power of removal." In Whitehead v. Railway Co., 99 Mo. 263, 11 S. W. 751, it was held that a conductor of a freight train, who has entire charge thereof, and who is under the duty of preventing persons from riding thereon, either with or without payment of fare, is acting in the scope of his employment when he permits a person to ride in the caboose, and the company is thereafter bound to use at least ordinary care towards such person.

[4] Lucas v. Railway Co., 33 Wis. 41; Boehm v. Railway Co., 91

ple that, by permitting passengers to ride on part of its freight trains, the company has clothed its freight conductors with apparent authority to receive passengers, as to the general public unable to distinguish, by their general appearance, the passenger carrying

Wis. 592, 65 N. W. 506; Everett v. Railway Co., 9 Utah, 340, 34 Pac. 289. So, if a railroad company accepts a passenger's fare, and permits him to ride on a freight train, he is a passenger, within the meaning of the law, and the company is bound by the same degree of care as though it was a passenger train. International & G. N. Ry. Co. v. Irvine, 64 Tex. 534; Edgerton v. Railroad Co., 39 N. Y. 227, affirming 35 Barb. (N. Y.) 389; Whitehead v. Railway Co., 99 Mo. 263, 11 S. W. 751. See, also, ante, § 17. One riding on a freight train on which passengers are allowed to be carried is a passenger, though he may have boarded the train without the conductor's knowledge or permission, and paid no fare, if the conductor, after becoming aware of his presence, permits him to remain. Sherman v. Railroad Co., 72 Mo. 62. One who rides in a freight train which occasionally carries passengers, and pays his fare, is a passenger. Mobile & O. R. Co. v. McArthur, 43 Miss. 180. Where a railroad company, in accordance with its custom, permits a drover to accompany his stock on the train, in consideration of the freight paid for the stock, the rights of the drover as a passenger are not affected by the fact that passengers are not permitted to travel on the freight train. Flinn v. Railroad Co., 1 Houst. (Del.) 469. A shipper of freight who, by direction of the company's agent, gets on the caboose of that train for the purpose of being transported, is a passenger, whether he has paid fare or not. Secord v. Railway Co., 18 Fed. 221. Evidence that a railroad company is accustomed to carry passengers on freight trains, and that there were several passengers on the freight train from which plaintiff was expelled, is sufficient to show that passengers were entitled to be carried on that train. Illinois Cent. R. Co. v. Sutton, 53 Ill. 397. Where a passenger makes due inquiry of a ticket agent whether a freight train carries passengers, and is informed that it does, and gets on board with the knowledge of the conductor, the company is liable for his ejection from that train by the conductor, who refuses to receive his ticket. Boehm v. Railway Co., 91 Wis. 592, 65 N. W. 506.

from the non passenger carrying freight trains.[5] So, where a statute requires all railway companies to carry passengers on local freight trains, a person who is permitted to board a freight train without objection, and whose fare is accepted by the conductor, has a right to presume that the train is a local freight, and he is entitled to all the rights of a passenger.[6]

[5] The principles which ought to govern this class of cases are very clearly and forcibly stated by Sherwood, J., in Berry v. Railway Co., 124 Mo. 223, 334, 25 S. W. 229, 259. "From these authorities this principle is clearly deducible: That the conductor of a freight train cannot create the relation of passenger and common carrier between his principal, the company, and the applicant for passage, unless such conductor has authority so to do; that this authority may be either real or apparent, and, if the latter, the applicant must be ignorant that the authority thus apparent is not real; and that, notwithstanding such apparent authority, if the applicant be advised that the authority is merely simulated, by reason of being in violation of the rules of the company, he cannot become a passenger, either as to passage, privileges, or protection; and this because of the lack of power in the conductor to create any contractual relation between his principal and the person seeking transit. The initial question in all such cases is the simple one of agency. If the conductor has been by his principal held out as possessing power to make such a contract, or has apparently been clothed with the habiliments of such authority,—as, ex. gr., by reason of some freight trains being allowed to carry passengers, and others being forbidden so to do, and the public being unable to distinguish by their general appearance such passenger carrying from the non passenger carrying trains,—in that event a party, not being able to distinguish one kind of train from the other, and unaware of any rule of the company forbidding it, may in good faith go on such non passenger carrying freight train, pay his fare, and enjoy all the privileges and protection pertaining to the position of passenger. The principle here announced is but in conformity to one of the most familiar doctrines of the law of agency, which remains immutably the same, no matter what the varied circumstances or conditions in which it may be applied."

[6] Arkansas Midland Ry. Co. v. Griffith (Ark.) 39 S. W. 550.

All the cases, however, unite in holding that one who knows that he is violating the rules of the company by riding on a freight train, is not a passenger, though he has the conductor's permission, and though he has paid fare.[7]

§ 226. PERSON ON OTHER NON PASSENGER CARRYING VEHICLES.

The principles above laid down are also applicable in determining whether or not a person riding on a non passenger carrying vehicle other than a freight train is a passenger. If a person, by his own solicitation or consent, is carried on a vehicle which is not used for passenger carriage, there can be no presumption that he is a passenger, though the owner be a common carrier by other and different means of conveyance.[1] A

[7] Railroad v. Hailey, 94 Tenn. 383, 29 S. W. 367; Houston & T. C. Ry. Co. v. Moore, 49 Tex. 31; Whitehead v. Railway Co., 22 Mo. App. 60; Texas & P. Ry. Co. v. Hayden, 6 Tex. Civ. App. 745, 26 S. W. 331. Where the conductor refuses permission to a person to ride on a freight train, telling him that it is contrary to rules to so ride, the fact that a brakeman afterwards permits such person to ride will not constitute him a passenger. Gulf, C. & S. F. Ry. Co. v. Campbell, 76 Tex. 174, 13 S. W. 19. A purchaser of a round-trip ticket has no right to ride on his return trip on a freight train, in known violation of the company's rules, and he may be ejected therefrom. Claybrook v. Railway Co., 19 Mo. App. 432.

§ 226. [1] Snyder v. Railroad Co., 42 La. Ann. 302, 7 South. 582. In this case, a railroad company, for its convenience and that of shippers, had constructed, at the termination of its track at Black river, an elevator or platform car, which was used in lowering and raising freight on an incline track, extending from its depot on the bank to the water's edge. Held, that a shipper of fish, who undertakes to ride on the car up the incline to the depot, without defendant's con-

person riding on a tugboat, not designed for the carriage of passengers, is not a passenger, though invited aboard the boat by employés thereon, where the employés have been forbidden to carry passengers, and passengers have never been carried on the boat with the consent of the company's representatives.[2]

One transported on a hand car which is used by the railway company for the convenience of its employés, and on which the carriage of passengers is forbidden by the rules of the company, does not occupy towards it the relation of a passenger, though he may be ignorant of such rules, if there is no custom to permit persons to ride on the hand car, shown to have been known to or acquiesced in by the officials of the company.[3] But if it is shown that a hand car is sometimes used by the company for the transportation of passengers, and that none of its rules are violated thereby, a person riding on a hand car at the invitation of one of the company's agents is a passenger.[4] So, a train

sent, is not a passenger, but a trespasser, and there can be no recovery for his death caused by the breaking of the wire rope by which the car was operated.

[2] Cook v. Navigation Co., 76 Tex. 353, 13 S. W. 475.

[3] Gulf, C. & S. F. Ry. Co. v. Dawkins, 77 Tex. 228, 13 S. W. 982; Railway Co. v. Bolling, 59 Ark. 395, 27 S. W. 492; International & G. N. R. Co. v. Cock, 68 Tex. 713, 5 S. W. 635. Owing to the wreck of a freight train, a railroad company declined to run its passenger train. The conductor of the train, without knowledge of his superiors, procured a hand car to go to the scene of the wreck, and took plaintiff on board, collecting from her the usual fare. The hand car jumped the track, and plaintiff was injured. Held, that plaintiff was not a passenger, and could not recover. Cincinnati, J. & M. R. Co. v. Morley, 4 Ohio Cir. Ct. R. 559.

[4] Prince v. Railway Co., 64 Tex. 144. A person who rides on a hand car, at the invitation of a section foreman, is not a passenger,

master, who is the representative of the company on his division of the road in respect to all matters connected with the use of the road, cars of all kinds, and the service of employés, is acting within the apparent scope of his authority when he directs certain persons to be transported on a hand car, though the company's rules forbid the use of hand cars for that purpose.[5]

One who, without invitation of an authorized agent, and without payment of fare, takes passage on a timber train, which is forbidden to carry other than those engaged in the shipment of lumber, he not being of that class, is not a passenger, but a trespasser.[6] So, one

unless he can show that the foreman had express authority from the company to receive passengers on hand cars, or that there was such a general and continuous custom on the part of the foreman to receive passengers as would be notice to the company and the public. Willis v. Railroad Co. (N. C.) 26 S. E. 784.

[5] International & G. N. R. Co. v. Prince, 77 Tex. 560, 14 S. W. 171. Where a detective employed by a railroad company to ferret out thefts from its cars is directed by an authorized agent to go at once from one station to another on its road, and, on going to the station, finds a hand car ready for his reception, on which he is requested to make the journey, it will be presumed that the hand car was furnished and tendered to him by an authorized agent of the company. Pool v. Railway Co., 56 Wis. 227, 14 N. W. 46.

[6] Railroad Co. v. Meacham, 91 Tenn. 428, 19 S. W. 232. Deceased, who had been hired to go to work for a logging company, was instructed by the superintendent to get his blanket and outfit some distance from the camp, and return and report for duty, and to ride on one of the lumber company's logging trains for that purpose. Held that, while so riding, deceased was neither a servant nor a passenger, but that he was legally on the train, and that the company owed him the duty of exercising ordinary care in the management of its train, though it had never authorized the use of such train for passenger traffic. Albion Lumber Co. v. De Nobra, 19 C. C. A. 168, 72 Fed. 739. Several persons got on a caboose attached to a construction

who enters a car attached to a provision and pay train, knowing its character, without the consent of the corporation or its agents, and in violation of its rules, is a trespasser.[7] Where a private corporation engaged in making iron and mining coal operates a railroad in connection with its business, the unauthorized act of its yard master in permitting an excursion train from another road to go upon its track does not render it liable for an injury to a passenger in a collision with one of its cars, caused by the negligence of its employés. The excursion train was on defendant's track without lawful authority, and it would be liable only in case of wanton and willful or intentional wrong.[8]

227. PERSON ON WRONG TRAIN.

It is a principle of law too well settled to require further elucidation that a person who, by mistake, gets on a passenger train other than the one upon which he expected to take passage, is, nevertheless, a passenger

train, without objection from the conductor. A short distance from the station the train broke down, and the caboose had to be left behind. The conductor demurred to these persons riding any further, but made no imperative objection. When the train reached the end of its outgoing trip, the conductor notified them that the train would start back in 20 minutes. They returned in time, and took their seats on a flat car next to the locomotive. On this return trip the train was derailed, and some were seriously injured and some killed. The conductor had no authority to receive passengers, and they paid no fare, and there was evidence that at least one of them had notice that it was against the company's rules to receive passengers on that train. Held, as matter of law, that these persons were not passengers. Berry v. Railway Co., 124 Mo. 223, 25 S. W. 229.

[7] Southwestern R. v. Singleton, 66 Ga. 252.

[8] Vormus v. Railroad Co., 97 Ala. 326, 12 South. 111.

upon the train he is on; and, while on the train, the company owes him the same duty of protection against negligence as to other passengers.[1]

§ 228. WHEN RELATION BEGINS—PERSON AT STATION.

To become a passenger, and entitled to protection as such, it is not necessary that a person shall have entered a train or paid his fare, but he is such as soon as he comes within the control of the carrier at the station, through the usual approaches, with intent to become a passenger.[1] There can be no doubt that a carrier is under the duty of exercising care for the safety of such a person, since he comes on the carrier's premises by invitation. But, as to the degree of care that the carrier is bound to exercise towards such a person, there is, as we have seen, considerable conflict in the authorities.[2] The supreme judicial court of Massachusetts has recently said: "When one has made a contract for passage upon a vehicle of a common carrier,

§ 227. [1] Lewis v. Canal Co., 145 N. Y. 508, 40 N. E. 248, affirming 80 Hun, 192, 30 N. Y. Supp. 28; Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352; Columbus, C. & I. C. Ry. Co. v. Powell, 40 Ind. 37; International & G. N. Ry. Co. v. Gilbert, 64 Tex. 536.

§ 228. [1] Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201. It is not necessary that there be an express contract, in order to constitute the relation of passenger and carrier, nor that there should be a consummated contract. The contract may be implied from slight circumstances, and it need not be actually consummated by the payment of fare, or entry into the car or boat of the carrier. North Chicago St. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672.

[2] Ante, § 47.

and has presented himself at the proper place to be transported, his right to care and protection begins, and ordinarily it continues until he has arrived at his destination, and reached the point where the carrier is accustomed to receive and discharge passengers. So long as he stands strictly in this relation of a passenger, the carrier is held liable to the highest degree of care for his safety. While he is upon the premises of the carrier, before he has reached the place designed for use by passengers waiting to be carried, or put himself in readiness for the performance of the contract, the carrier owes him the duty of ordinary care, as he is a person rightfully there by invitation." [3] But it is generally held that a person who enters a railroad station shortly before the advertised time of departure of the train on which he intends to take passage is a passenger from the moment he enters on the company's premises, though he has not purchased a ticket,[4] or though the agent refuses to sell him a ticket.[5] So, one who has actually purchased a ticket, and who enters

[3] Dodge v. Steamship Co., 148 Mass. 207, 19 N. E. 373. A man walking towards a railroad station, with the intention of buying a ticket and taking a train after he gets there, is not a passenger before he reaches the station, even if he might be one in the same place if he had begun his journey. June v. Railroad Co., 153 Mass. 79, 26 N. E. 238.

[4] Grimes v. Pennsylvania Co., 36 Fed. 72.

[5] Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935. No matter how a person reaches a railroad station,—as by trespassing on a train,—yet, if he then proceeds to the ticket office to purchase a ticket, with the intention of becoming a passenger, he is entitled to protection as such while traversing the way usually taken by passengers to the ticket office. Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201.

the waiting room at the station not an unreasonable length of time before the train en route for his destination is due, is a passenger.[6] It has even been held that one who enters the waiting room of a station with the intention of taking a train scheduled to arrive in about 20 minutes is a passenger while so waiting, though she has not purchased a ticket; and her presence in the station is notice to the company's agent of her intention to become a passenger.[7] And one who has purchased a ticket at a station has all the rights of a passenger while going by the usual way from the station to the train.[8] So, one waiting at a station for passage

[6] Batton v. Railroad Co., 77 Ala. 591. The purchase of a ticket good for a passage between two stations on a line of railway creates the relation of carrier and passenger. Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296.

[7] Texas & P. Ry. Co. v. Jones (Tex. Civ. App.) 39 S. W. 124.

[8] Warren v. Railroad Co., 8 Allen (Mass.) 227; Baltimore & O. R. Co. v. State, 63 Md. 138; Chicago & E. I. R. Co. v. Chancellor, 60 Ill. App. 525. One who enters a waiting room, and inquires for a ticket, and is directed by the agent to get on the train without a ticket, is a passenger while walking from the station house to the train, and is entitled to the high degree of care which carriers must exercise towards passengers. Allender v. Railroad Co., 37 Iowa, 264. But it has been held that a person crossing a side track at a railroad station to take a train, without having purchased a ticket, is not a passenger, but stands in the same relation as a person endeavoring to cross a railroad track at a highway crossing, and the railroad company need exercise only ordinary care for his safety. Indiana Cent. Ry. Co. v. Hudelson, 13 Ind. 325. Any person who is going in the proper way, by any proper approach, to take the cars, or purchase a ticket, or to get baggage checked, is a passenger. Johns v. Railroad Co., 39 S. C. 162, 17 S. E. 698. So is one who comes upon the premises of a railroad company at a station, with a ticket, or with the purpose of purchasing one. Tillett v. Railroad Co., 115 N. C. 662, 20 S. E. 480; Central R. & B. Co. v. Perry, 58 Ga. 461.

on a train soon to depart, who is invited by the ticket agent to sit in an empty car standing on a side track, while the station room is being cleaned, is entitled to the same protection from the company while in the car as if in the regular waiting room. In either place the person is a passenger in the care of the company.[9] A person who goes to a flag station on a railroad at which there is no ticket office, for the purpose of boarding a train, is, upon properly signifying an intention to get upon a passenger train which has actually stopped, entitled to the rights of a passenger.[10]

Of course, one who actually enters a train designed for the transportation of passengers, with the honest purpose of securing the right to ride therein, is a passenger while waiting for the train to start.[11] So, a passenger who has been carried on the line of a rail-

9 Shannon v. Railroad Co., 78 Me. 52, 2 Atl. 678. An excursion car was run beyond the station grounds, onto a side track. When the time to begin the return trip came, in the nighttime, a number of excursionists got on the car, and shortly afterwards the conductor came along, and asked for help to shove the car onto the main track. One of the passengers, for this purpose, left the car on the opposite side from that on which he got on, and fell from the bridge on which the car was standing. Held that, though the car was not in the station grounds, yet as the conductor had taken charge of it, and the excursionists had placed themselves under his care, plaintiff was a passenger at the time he fell. Bellman v. Railroad Co., 42 Hun, 130.

10 Western & A. R. Co. v. Voils (Ga.) 26 S. E. 483.

11 Cross v. Railroad Co., 56 Mo. App. 664; Illinois Cent. R. Co. v. Sheehan, 29 Ill. App. 90. So is a person who is injured while walking along the gangplank of a steamer, with a view of making a journey on a pass. Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. 1069. One who has purchased a railway ticket, and entered the proper train for transportation, is a passenger while riding thereon. Choate v. Railway Co., 67 Mo. App. 105.

way in a passenger car which that company switches off upon the line of a connecting railway sustains the relation of passenger to such connecting railway during the time the car is stationary and he remains in it, if, according to the usual course of business, that company is accustomed to receive presently cars so delivered to it, couple them onto its trains, and carry them over its own lines. This is true whether the passenger, at the time of being injured, has procured a ticket or paid his fare for a passage over the connecting line, or not.[12] So, one who holds a ticket good over two connecting railroads, and who, on arrival at the end of the first carrier's route, goes to the depot of the connecting carrier, and remains there, without objection, waiting for the next train, is a passenger while so waiting, though the next train is not scheduled to leave for 10 hours; and the connecting carrier is bound to protect her, as a passenger, from assault and insult while so waiting.[13]

But a carrier is not under a duty of exercising care for the safety of a person who comes on its premises for the purpose of boarding a train at a place not a regular station or stopping place for receiving and discharging passengers. Thus, a stock drover who goes into a railroad freight yard, in the nighttime, about an hour before the starting time of his train, and who is ordered out of the caboose because the train is not ready, and who then takes a position on one of the switch tracks, is not a passenger while there; and mere negligence,

[12] Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494, 15 S. E. 848.

[13] St. Louis S. W. Ry. Co. v. Griffith (Tex. Civ. App.) 35 S. W. 741.

short of willfulness, will not render the company liable for injuries inflicted by being run over by a train while on the track.[14] So, the fact that a person goes on the platform of a flag station where there is no depot or waiting room, with the intention of taking a train and paying his fare, does not create the relation of passenger and carrier, there being nothing to show that the carrier was aware of his intention to board the train.[15] So, one who, by signals, causes a passenger train to stop at night at a point not a stopping place, and while endeavoring to enter, though with proper caution, is injured by the sudden starting of the train, cannot recover for the injury, if his purpose to take passage was unknown to the conductor and other trainmen. The fact that he succeeded in entering the car, and that the conductor, finding him there, collected fare from him, as from other passengers, does not make him a passenger at the time he boarded the train and was injured.[16]

[14] Henry v. Railway Co., 76 Mo. 288. See, also, to same effect, Haase v. Navigation Co., 19 Or. 354, 24 Pac. 238.

[15] Denver, S. P. & P. R. Co. v. Pickard, 8 Colo. 163, 6 Pac. 149.

[16] Georgia Pac. Ry. Co. v. Robinson, 68 Miss. 643, 10 South. 60. One who, without the knowledge of any of the trainmen or servants of a railroad company, endeavors to get on a train which has stopped to discharge passengers at a station where it is not accustomed to stop for the purpose of receiving them, does not thereby become or acquire the rights of a passenger, though he has a ticket, and cannot recover for injuries sustained by the sudden starting of the train while he was endeavoring to get on board. Jones v. Railroad Co., 163 Mass. 245, 39 N. E. 1019. One who, without invitation, express or implied, goes on board a steamer lying at her dock, at a time when it is not open to the public, is a mere licensee, if not a trespasser, and cannot recover for injuries sustained by the negligence of the ship's crew. Metcalfe v. Steamship Co., 147 Mass. 66, 16 N. E. 701.

But, if a common carrier is in the habit or has the custom of receiving and discharging passengers at a place other than a regular station,—as, near a crossing over an intersecting railroad,—a person who, knowing of such a custom, attempts to board a train at such a place, is a passenger, and not a trespasser.[17]

§ 229. SAME—OMNIBUS AND STREET CAR.

One who has signaled an omnibus or a street car to stop is a passenger while attempting to prudently get on board after the driver has stopped in response to his signal. The stopping of the vehicle in response to his signal implies a consent to receive him as a passenger.[1] But the special duty of a carrier to exercise a high degree of care begins only when, by coming upon his premises, or in the act of entering his vehicle, the actual relation of passenger to carrier is assumed.

[17] North Birmingham R. Co. v. Liddicoat, 99 Ala. 545, 13 South. 18. When a person boarding a car at such a place has reached a place of safety inside a passenger car, then certainly, if not before, he becomes entitled to all the rights of a passenger. Dewire v. Railroad Co., 148 Mass. 343, 19 N. E. 523. One who enters a passenger train, prepared for the reception of passengers, though not drawn up at the station platform, intending to ride in such car to another station, and having the money to pay his fare to the conductor, which he may legally do, and intends to do, is a passenger. Missouri, K. & T. Ry. Co. of Texas v. Simmons (Tex. Civ. App.) 33 S. W. 1096.

§ 229. [1] Brien v. Bennett, 8 Car. & P. 724; Smith v. Railway Co., 32 Minn. 1, 18 N. W. 827. Neither an entry into the cars of a street railroad, nor the payment of fare, is essential to create the relation of carrier and passenger. Being within the waiting room provided by the company, waiting to take the cars, is as effectual to make one a passenger as if he were within the body of the car. Gordon v. Railroad Co., 40 Barb. (N. Y.) 546.

Hence one who steps out on a cross walk, and signals a street car to stop, which signal is answered affirmatively by the driver, is not a passenger while so standing, waiting for the car to stop; and her right to recover damages for injuries sustained by being struck by the car, which was unexpectedly deflected on a side track on which she was standing, does not depend on the rules governing the carrier's duty to a passenger, but on those governing the duty of a driver of a vehicle in the street to a pedestrian lawfully therein.[2]

§ 230. SAME—PERSONS BOARDING MOVING TRAIN OR STREET CAR.

One who attempts to board a moving train under such circumstances as to make the attempt contributory negligence as matter of law is not a passenger. One making such an attempt is outside of any implied invitation on the part of the carrier, and acquires no rights as a passenger until he has passed the danger which meets him at the threshold, and has put himself in the proper place for the carriage of passengers, i. e. until he has reached a place of safety and seated himself inside the car.[1] But one who offers to pay for a

[2] Donovan v. Railway Co., 65 Conn. 201, 32 Atl. 350.

§ 230. [1] Merrill v. Railroad Co., 139 Mass. 238, 1 N. E. 548; Schaefer v. Railway Co., 128 Mo. 64, 30 S. W. 331; Spannagle v. Railroad Co., 31 Ill. App. 460. A passenger whose fare was 25 cents handed the conductor a $5 bill, and the conductor, being unable to change it, retained it, under an agreement that he would get it changed at the next station, which was also the passenger's destination, and return the balance to him. On arriving there, the passenger left the train, which stopped 25 or 30 minutes. The conductor forgot about the matter, and, as the train was moving off, the passenger boarded it to

ticket at the ticket office, and who is told by the agent to get on a train,—a freight train,—and pay his fare to the conductor, is a passenger; and the question whether he forfeits his right by climbing on the ladder of a freight car, because the train was already in motion when he got out of the ticket office, is one of fact for the jury.[2]

The same principles apply to persons boarding moving street cars. One who attempts to board a street car while it is moving so rapidly as to make such attempt contributory negligence as matter of law is not a passenger, to whom the company owes extraordinary care, but it is bound only to the use of ordinary care for his safety after its employés have discovered his danger.[3] But a person is not to be considered a trespasser

get his money. The conductor handed him back his bill, and he jumped off at a point not intended for passengers. Held, that his so boarding the train for the sole purpose of getting his money did not create the relation of passenger and carrier between the parties, but that he could not be regarded as a trespasser, but was a person lawfully on the train. Pittsburgh, C. & St. L. R. Co. v. Krouse, 30 Ohio St. 222. As to contributory negligence in boarding moving train, see ante, §§ 149, 150.

[2] Ramm v. Railway Co. (Iowa) 62 N. W. 751. One who attempts to get on the caboose of a slowly-moving train at a station, in obedience to the conductor's command, is a passenger while making the attempt, and entitled to protection as such. Murphy v. Railway Co., 43 Mo. App. 342.

[3] Baltimore Traction Co. v. State, 78 Md. 409, 427, 28 Atl. 397. One does not become a passenger by a mere attempt on his part to board a street car while in motion. There must have been some act on the part of the carrier indicating an acceptance. Schepers v. Railway Co., 126 Mo. 665, 29 S. W. 712; Stager v. Railway Co., 119 Pa. St. 70, 12 Atl. 821. The failure or refusal to stop a street car does not justify a person in running after it, and attempting to board it, and he

while getting on a horse car in motion, though in violation of the company's rules, where the conductor has waived the rule by making no objection and giving no warning when he sees such person making the attempt.[4]

§ 231. WHEN RELATION TERMINATES.

A passenger on a railroad train continues to be such until the train has arrived at his destination, and he has had a reasonable opportunity, by safe and convenient means, to leave the car and the station.[1] An ap

cannot recover for injuries sustained in the attempt. Basch v. Railway Co., 40 Ill. App. 583.

[4] North Chicago St. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672. In this case it was said: "But we are not prepared to hold that a party is a trespasser after he gets on a horse car, even though no fare has been collected of him before he meets with an injury, simply because he has violated a rule of the company as to the mode of getting on." A 12 year old boy attempted to get on a moving horse car. He had placed one foot upon the step, and was holding to the railings with both hands, when the driver started the horses with a jerk, and the boy was thrown down and injured. Held, that the boy was a passenger. McDonough v. Railroad Co., 137 Mass. 210. The court said: "The length of time he had been upon the car, and his position upon it, and the fact that he was changing his position, and had not assumed his seat or taken his stand upon the platform, are immaterial. He was in the car, and being carried by it on his journey. The instruction that, if he was there in the exercise of due care, he had the rights of a passenger, was correct."

§ 231. [1] McKimble v. Railroad, 139 Mass. 542, 2 N. E. 97. But in Dodge v. Steamship Co., 148 Mass. 207, 19 N. E. 373, it is said: "It has sometimes been said that a passenger at the end of his journey retains the same relation to the carrier until he has left the carrier's premises. But there are cases which indicate that the contract of carriage is performed when the passenger at the end of his journey has reached a safe and proper place, where persons seek

proach to a railway depot on premises belonging to a railroad company constitutes a part of the station grounds, and the relation of passenger and carrier does not cease until after the passenger has left the approach.[2] So a passenger set down several hundred yards from a station is not a trespasser in walking along the track to the station.[3] So the fact that a passenger, after alighting from a train, walks along the

ing to become passengers are regularly received and passengers are regularly discharged, and that the degree of care to which he is then entitled is less than during the continuance of his contract, as a carrier of goods is held to a liability less strict after they have reached their destination and been put in a freight house than while they are in transit."

[2] Gulf, C. & S. F. Ry. Co. v. Glenk (Tex. Civ. App.) 30 S. W. 278; Stewart v. Railroad Co., 53 Tex. 289.

[3] Central R. R. v. Thompson, 76 Ga. 770. Where the only egress from a railroad track near a crossing with another railroad is a highway some distance from the crossing, a passenger who leaves the train at the crossing, which is recognized as a station by the railroad company, is lawfully on the railroad track, and not a trespasser, while walking along it to reach the highway; and the company is liable for his death while so walking, caused by the negligence of the train hands of a following train in failing to give the statutory signals on approaching the highway. Anderson v. Railway Co., 27 Ont. 441. At the terminal station of a railroad there was snow to a considerable depth on both sides of the track. A brakeman beat down the snow by the side of the car to make a place for plaintiff to alight, who was a woman 60 years old, and the only passenger on the train. After standing there for some time, waiting for an engine to remove some flat cars which obstructed her passage, she objected to remaining there any longer. The brakeman requested that she should pass over these cars, and leave the train that way. She did so, but in attempting to get down from the last car her clothes caught in the coupling pin, and she fell and was injured. Held, that her relation as a passenger had not terminated at the time of the accident, and that defendant was bound to use due care in

platform with the intention of crossing the track at a point where she has no right to cross, does not make her a trespasser or a licensee while on the platform.[4] So, where a railroad company, at a stopping place, provides means for ingress and egress of passengers on only one side of its tracks, a passenger does not forfeit his rights as such by intentionally leaving the train on the wrong side. He would still be a passenger, if, by reason of the company's neglect of precautions which it should have taken, he leaves the cars upon the wrong side, and thereby loses his life by being struck by a passing train on a parallel track.[5] And a passenger who falls from the train through the negligence of the company, and who is knowingly left in a dazed state on the track, is not a trespasser.[6]

But a passenger ceases to be such by stepping off a train while in motion, and is thereafter not entitled to

furnishing her means to alight. Hartzig v. Railroad, 154 Pa. St. 364, 26 Atl. 310.

[4] Keefe v. Railroad, 142 Mass. 251, 7 N. E. 874. But a passenger ceases to be such when he leaves the train at destination, and proceeds in a reverse direction from that which passengers usually take in departing from the station platform, and undertakes to see the engineer of the train on private business, and the company is under no duty of care to furnish him a safe way for this purpose. Hendrick v. Railroad Co. (Mo. Sup.) 38 S. W. 297.

[5] McKimble v. Railroad, 141 Mass. 463, 5 N. E. 804. A passenger does not forfeit his rights as such by leaving the train at a point where the company was obliged by law to stop before crossing the track of an intersecting road, and at which point the company had erected a building and platform adapted for the use of passengers, and used by them to enter its trains, as well as by its workmen at its shops in the immediate vicinity. Id.

[6] Cincinnati, I., St. L. & C. R. Co. v. Cooper, 120 Ind. 463, 22 N. E. 340.

the rights of one.[7] And so with a passenger who has reached his destination, alighted from the train, and taken a position on the sidewalk of a highway.[8]

§ 232. SAME—FAILURE TO LEAVE TRAIN.

The severing of the relation of carrier and passenger is not necessarily dependent on the question whether or not the passenger has left the train. One who remains after a reasonable time has elapsed for him to leave the car at his destination is no longer a passenger; and a reasonable time is the time within which persons of ordinary prudence and care, under like circumstances, get off the car.[1] So, one who, having had a reasonable opportunity to leave the train at his destination, remains for the unlawful purpose of assaulting a train employé, must be considered as having abandoned the protection afforded him by his contract.[2]

But where a freight train stops at some distance

[7] Com. v. Railroad, 129 Mass. 500.

[8] Allerton v. Railroad, 146 Mass. 241, 15 N. E. 621.

§ 232. [1] Imhoff v. Railway Co., 20 Wis. 362. One who has had about half an hour's time to leave the train at destination, which is also the terminus of the railroad, can no longer be considered a passenger, and the company thereafter owes him no duty as such. Chicago, K. & W. R. Co. v. Frazer, 55 Kan. 582, 40 Pac. 923.

[2] Chicago, R. I. & P. Ry. Co. v. Barrett, 16 Ill. App. 17. One who enters a railroad station in the evening to take a train, and, after finding that the last train has gone, remains therein for his own convenience several minutes longer, during which the station master, the usual closing time having arrived, puts out the lights, becomes at most a mere licensee, and cannot recover for injuries sustained, in leaving the station, by reason of the extinguishment of the lights. Heinlein v. Railroad Co., 147 Mass. 136, 16 N. E. 698.

from the station platform, and the brakeman assures a passenger about to alight that the train will stop at the platform, and that he had better not get off until then, the company is estopped from claiming that the passenger is in fault in not leaving the train at that time, and it is also estopped from asserting that the relation of passenger ceased when the train had stopped long enough to enable the passenger to leave the car.[3]

§ 233. SAME—STREET CARS.

One who steps from a street car to the street ceases to be a passenger when he alights. The street is in no sense a passenger station, for the safety of which the street railway is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the side-

[3] Eddy v. Wallace, 1 C. C. A. 435, 49 Fed. 801. Plaintiff, traveling in charge of a horse, assumed, by a contract with the company, the duty of caring for it while in transportation. The car containing the horse arrived at its destination about 2 a. m., and was placed on a side track. Plaintiff left it for a few minutes, but returned, and lay down. He was subsequently injured in a collision between a locomotive and the car. Held that, though the relation of passenger and carrier had ceased, and though the degree of care owing to him by defendant might not be so great, yet, if prudent attention to his horse rendered it proper for him to be on the car, of which question the jury was the judge, he was rightfully there, and defendant owed him the duty of exercising ordinary care to avoid injuring him. Orcutt v. Railroad Co., 45 Minn. 368, 47 N. W. 1068.

walk.[1] Thus, after a person alights from a street car, on the side away from the track, in a place of safety, his relation as a passenger ceases; and when he afterwards walks around the rear of the car, and attempts to cross a parallel track, his rights are only those of a traveler about to cross a public street.[2]

§ 234. SAME—PASSENGER LEAVING CONVEYANCE AT INTERMEDIATE STATION.

"Whenever performance of the contract, in a regular and proper way, necessarily involves leaving a vehicle and returning to it, a passenger is entitled to protection as such, as well while so leaving and returning as at any other time. * * * To determine the rights of the parties in every case, the question to be answered is, what shall they be deemed to have contemplated by their contract? The passenger, without losing his rights while he is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. * * * Where one engages transportation for himself by a conveyance which stops from time to time along his route, it

§ 233. [1] Creamer v. Railway Co., 156 Mass. 320, 31 N. E. 391; Smitt v. Railway Co., 29 Or. 539, 46 Pac. 136.

[2] Buzby v. Traction Co., 126 Pa. St. 559, 17 Atl. 895. See, also, Platt v. Railroad Co., 2 Hun, 124. But in Burbridge v. Railway Co., 36 Mo. App. 669, it was held that where a cable railroad has a rule in force that, at a junction point, east-bound trains shall clear the junction before west-bound trains shall approach on a parallel track, one who leaves an east-bound train is still a passenger, in so far that he is entitled to protection against the negligent movement of defendant's trains on its north track, while he is crossing it, on his way to the sidewalk.

may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties." [1] Thus a passenger does not cease to be such while going to and returning from a place of refreshment at a station where the train has stopped for the purpose of enabling passengers to partake of a meal.[2] So one who must necessarily change cars to arrive at his destination, and must pass over the intervening track of the carrier in crossing from one train to another, continues to be a passenger, and is entitled to the degree of care that the carrier owes passengers.[3] So, where the progress of a passenger train is obstructed by a wreck of a freight train, and the passengers are transferred to the other side of the wreck to await another train, the passengers, while so waiting, are still passengers, and are entitled to all the rights of passengers.[4]

Even where a passenger leaves a train at an intermediate station to speak to some one on the platform, the

§ 234. [1] Dodge v. Steamship Co., 148 Mass. 207, 19 N. E. 373. A passenger on a railroad train does not lose his character as such by alighting from the cars at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of the journey. Parsons v. Railroad Co., 113 N. Y. 355, 21 N. E. 145; Id., 37 Hun, 128.

[2] Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; Atchison, T. & S. F. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108.

[3] Baltimore & O. R. Co. v. State, 60 Md. 449.

[4] Conroy v. Railway Co. (Wis.) 70 N. W. 486.

railroad company must exercise ordinary care to enable him to board the train in safety.[5] In the case of passengers on vessels, the rule seems to be very liberal. It has been held that a passenger for hire, traveling on a vessel, has a right to go ashore at an intermediate landing place, even for the purpose of buying tobacco,[6] without forfeiting his rights as a passenger to safe egress and ingress.[7] So a passenger on a steamer may properly go on shore to get his breakfast at an intermediate point, where the steamer stops for an hour, though meals are served on the steamer; and he has a passenger's right of protection during his egress from the steamer.[8]

In Maine and Minnesota, however, a different rule seems to prevail. In these states it is held that where a passenger enters a railway train, and pays the regular fare to be transported from one station to another, his contract does not obligate the corporation to furnish him with safe egress and ingress at any intermediate station. And where such train turns out upon a side track at an intermediate station, and there stops to await the crossing of another train out of time, and the passenger, not destined to that station, without objec-

[5] Galveston, H. & S. A. Ry. Co. v. Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990.

[6] Hrebrik v. Carr, 29 Fed. 298.

[7] Dice v. Willamette, T. & S. Co., 8 Or. 60. A passenger on a steamboat is under no obligation to remain on the boat until it reaches his destination; and if he is injured through the negligence of the steamer's servants, while leaving the boat at an intermediate point, where it stopped for two hours, the steamboat owners are liable. Keokuk N. L. P. Co. v. True, 88 Ill. 608.

[8] Dodge v. Steamship Co., 148 Mass. 207, 19 N. E. 373.

tion made or notice given, leaves the car, he thereby does no illegal act, but for the time surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence, and the carrier is not liable for injuries he sustains by being struck by a train on the main track while crossing it on his way to his train.[9]

Unquestionably, a passenger who leaves the train at an intermediate station ceases to be such on leaving the station, and the relation is not restored by his subsequently returning to the station, not for the purpose of resuming his journey.[10]

[9] State v. Railway Co., 58 Me. 176; De Kay v. Railway Co., 41 Minn. 78, 43 N. W. 182.

[10] Johnson v. Railroad, 125 Mass. 75.

CHAPTER XVII.

DUTY TO GRATUITOUS PASSENGERS AND PERSONS NOT PASSENGERS.

§ 235. Duty to Gratuitous Passengers.
236. Duty to Invited Persons, Licensees, and Trespassers.
237. Same—Escorts of Passengers.
238. Same—Persons Having Business at Stations.
239. Same—Licensees at Stations.
240. Same—Trespassers on Trains.
241. Same—Trespassing Children.

§ 235. DUTY TO GRATUITOUS PASSENGERS.

A common carrier owes the same degree of care to a gratuitous passenger as to a passenger paying fare, in the absence of a contract to the contrary.

The leading case on this subject is Philadelphia & R. R. Co. v. Derby,[1] decided by the supreme court of the United States in 1852. In that case it was held that the fact that a stockholder of a railroad company is being carried on a special car as the invited guest of the president of the road, without payment of fare, does not relieve the company of the duty of exercising due care for his safety. The court said that the duty to carry safely does not result alone from the consideration paid for the service, but it is imposed by law, even where the service is gratuitous. "The confidence induced by undertaking any service for another is a suf-

§ 235. [1] 14 How. 468.

ficient legal consideration to create a duty in the performance of it." And, whether the consideration for the transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or careless agents. This case has been followed, and the principle stated in the black-letter text has been reiterated, in numerous cases since.[2]

In Kansas, however, it is held that a railroad company does not owe to a person riding on one of its trains without payment of fare, merely by sufferance of the conductor, that high and extraordinary degree of care for his personal safety that is due to an ordinary passenger paying the customary fare, but is liable only for ordinary negligence.[3]

2 The New World v. King, 16 How. 469; Ohio & M. R. Co. v. Muhling, 30 Ill. 9; Rice v. Railroad Co., 22 Ill. App. 643; Rose v. Railroad Co., 39 Iowa, 246; Hoar v. Railroad Co., 70 Me. 65; State v. Railroad Co., 63 Md. 433; Todd v. Railroad Co., 3 Allen (Mass.) 18; Jacobus v. Railway Co., 20 Minn. 125 (Gil. 110); Hurt v. Railroad Co., 40 Miss. 391; Lemon v. Chanslor, 68 Mo. 340; Perkins v. Railroad Co., 24 N. Y. 196; Nolton v. Railroad Corp., 15 N. Y. 444; Prince v. Railway Co., 64 Tex. 144. A railroad company owes at least the duty of ordinary care towards one riding in the caboose of a freight train with the consent of the conductor, though he has paid no fare. Whitehead v. Railway Co., 99 Mo. 264, 11 S. W. 751. Children riding free, by reason of their youth, with their father on a passenger train, are passengers. Littlejohn v. Railroad Co., 148 Mass. 478, 20 N. E. 103.

3 Kansas City, Ft. S. & M. R. Co. v. Berry, 53 Kan. 112, 36 Pac. 53. One who rides on a construction train, with the consent of the conductor, without paying fare, is neither a passenger nor a trespasser, but he is rightfully there, and the company must exercise ordinary care for his safety. St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461. A little girl, less than five years old, placed on a passenger train, without payment of fare, and not in

Sometimes, however, it is difficult to distinguish a gratuitous passenger from a trespasser, especially in the cases of children riding free on street cars. The true rule would seem to be that a child who rides on a street car with the knowledge and permission of the person in charge, and without any intention to evade payment of fare, is a passenger, and not a trespasser, though he has paid no fare.[4] If there is no conductor on the car, the driver's consent or invitation will make a child so riding a passenger;[5] but where there is a conductor, and the driver is charged merely with the duty of driving the team, mere knowledge of the driver of a boy's presence on the car, and his failure to make

the custody of any person, is not a passenger, and the company need exercise only ordinary care for her safety. Atchison & N. R. Co. v. Flinn, 24 Kan. 447. These cases do not seem to be correctly decided. If the conductor of a train has authority, either real or apparent, to receive passengers on his train without payment of fare, then such persons are passengers, and entitled to all the rights of passengers. If the conductor has no such authority, then a person riding free would seem to be engaged in an attempt to evade payment of fare, with the connivance of the conductor, and the carrier is under no duty to exercise care for his safety.

[4] Muehlhausen v. Railroad Co., 91 Mo. 332, 2 S. W. 315.

[5] Wilton v. Railroad Co., 107 Mass. 108, 125 Mass. 130; Metropolitan St. Ry. Co. v. Moore, 83 Ga. 453, 10 S. E. 730. Since it is within the scope of the authority of the conductor and driver of a street car to receive passengers and let them off, the act of the driver in permitting a boy to ride free on the car is binding on the company, and the boy is a passenger, and not a trespasser. Brennan v. Railroad Co., 45 Conn. 284. A small boy riding on a street car, free of charge, with the consent of the driver, is a passenger, and entitled to protection as such. Buck v. Power Co., 108 Mo. 179, 18 S. W. 1090. Such a child is not a trespasser, and the company owes him the duty of exercising care for his safety. Evansville St. Ry. Co. v. Meadows, 13 Ind. App. 155, 41 N. E. 398.

any demand for fare, or to take any measures to ascertain whether the boy intended to pay fare, are not an assent to the boy's riding free of charge, so as to change his relation from a trespasser stealing a ride to that of a gratuitous passenger.[6]

§ 236. DUTY TO INVITED PERSONS, LICENSEES, AND TRESPASSERS.

The owner or occupant of real estate owes a duty of exercising care towards a person who comes on his premises by invitation, either express or implied; but, as to a licensee or a trespasser, he is under no such duty, but only under the duty of abstaining from willful and wanton injury as to trespassers, and, in addition, of giving a licensee notice of hidden dangers or traps.

The distinction between the duty owing to a licensee and a trespasser is comparatively unimportant in the class of cases with which we have to deal. The important question is, Towards what persons coming on its premises is a railroad company under the duty of exercising care? Now, it is agreed on all hands that there is a wide difference between the obligation which a person or corporation owes to a mere licensee, and the duty which the same person or corporation owes to one who comes upon his premises by an invitation, either express or implied. In the first case, it is generally admitted that the licensee comes at his own risk, and enjoys the license subject to its concomitant risks or per

[6] Wynn v. Railway Co., 91 Ga. 344, 17 S. E. 649.

ils, and that in such case no duty is imposed upon the owner or occupant to keep the premises in safe and suitable condition for his use. In other words, the licensee takes the premises as he finds them. But where the owner, directly or indirectly, induces or invites persons to enter and pass over his premises, he thereby assumes an obligation that they are in a safe condition and suitable for such use; and, if a person be injured by his breach of such obligation, the owner is liable therefor in damages.[1]

All the property of a railroad company, including its depot and adjacent yards, are private property, on which no one is invited, or can claim the right to enter, save those who have business with the railroad. As to this class of persons, the railroad company is bound to exercise care in the construction and maintenance of all portions of its platforms and approaches, station grounds, and waiting rooms to which the public do or would naturally resort. But the rule of obligation is essentially different when the asserted rights of mere idlers or sightseers are presented. To such the corporation owes nothing beyond the observance of the duties of good neighborhood. Among these may be prominently classed the universal duty of doing no willful or wanton injury, and of erecting or continuing no nuisance, trap, or pitfall from which personal injury is likely to ensue.[2]

§ 236. [1] Nichols' Adm'r v. Railroad Co., 83 Va. 99, 5 S. E. 171; Indiana, B. & W. Ry. Co. v. Barnhart, 115 Ind. 400, 408, 16 N. E. 121.
[2] Montgomery & E. R. Co. v. Thompson, 77 Ala. 448.

§ 237. SAME—ESCORTS OF PASSENGERS.

One who escorts a passenger to a station or to a seat in a train is not a mere trespasser, to whom the company owes no duty except to abstain from willful injuries; nor, on the other hand, is he a passenger towards whom the company is bound to the exercise of the highest degree of care and skill; but he is on the company's premises on its implied invitation, and it is bound to exercise ordinary care for his safety.[1] This implied in-

§ 237. [1] Little Rock & Ft. S. R. Co. v. Lawton, 55 Ark. 428, 18 S. W. 543; Cherokee Packet Co. v. Hilson, 95 Tenn. 1, 31 S. W. 737; Missouri, K. & T. Ry. Co. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 965; Hamilton v. Railway Co., 64 Tex. 251. This rule also prevails in Canada and in New South Wales. York v. Canada & A. S. Co., 22 Can. Sup. Ct. 167; Trice v. Navigation Co., L. R. 5 N. S. Wales, 137. But in Watkins v. Railway Co. (1877) 46 Law J. C. P. 817, it was said that the duty of a railway company towards those who in practice they allow to accompany passengers, in order to see them off by trains, without asking special permission, is not lower than towards those whom they accompany. So, in Evansville & T. H. R. Co. v. Athon, 6 Ind. App. 295, 33 N. E. 469, it was said that a father who assists his invalid daughter on a train is a passenger while so assisting and departing. In New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954, and 38 N. E. 871, it is said that the duty of a railroad company to keep its station platform in a reasonably safe condition extends to those who come to meet friends, or welcome the coming or speed the parting guest. In Langton v. Board of Land and Works, 6 Vict. Law Rep. 316, it was held that railway proprietors owe a duty to friends of a passenger, going to a station to receive him, to protect them from any dangerous place, not only in the way provided for access to the station, but also in any other way of access allowed to be commonly used by persons resorting to the station. One not a friend of an incoming passenger, but accompanying friends going to meet him, is entitled to the same protection.

vitation and consequent duty to those who go to welcome the coming or speed the parting guest is founded on the amenities and social observances which are an inseparable concomitant of modern railway and passenger traffic.

The duty to exercise ordinary care extends to one who, having an appointment with a passenger, enters the company's premises intending, in case the appointment is met, to become a passenger himself.[2] So, a notice forbidding all persons not having business with the railroad company from entering its cars does not apply to one who escorts a female passenger to a seat on the train.[3]

But the rule that it is the duty of a railway company to exercise ordinary care for the safety of persons accompanying an intending passenger, who is about to take a train in the course of regular passenger traffic, does not extend to one who, in the nighttime, goes on the freight platform to accompany a person who is about to leave on a train in charge of live stock. "A railway company has a right to expect that an arriving passenger or an intending one may be met or accompanied by friends, and so it may be said that, in virtue of the relation between the passenger and the company, there is an implied invitation in their case, and that it owes them a corresponding duty. Not so, however, in

2 Texas & P. Ry. Co. v. Best, 66 Tex. 116, 18 S. W. 224.

3 Little Rock & Ft. S. Ry. Co. v. Lawton, 55 Ark. 428, 18 S. W. 543. But, if railway employés offer to assist a woman to a seat, her escort has no right to enter the coach for that purpose, and the railway company owes him no duty, except to refrain from willful and wanton injury. Id.

the exceptional case, in freight traffic, where ladies, or others even, attend one who is about to leave in a freight car, riding in charge of live stock,—one who cannot be said to be a passenger except in a very limited and restricted sense." [4]

So, also, the rule that trains must be stopped a reasonable length of time for all passengers who desire to stop at the station to get on and off does not apply to one going on the train to escort a departing passenger to a seat, unless the company knows that he is merely an escort, and does not intend to become a passenger.[5]

[4] Dowd v. Railway Co., 84 Wis. 105, 54 N. W. 24. Where a passenger train stops temporarily several hundred yards from the depot, because its way is obstructed by a freight train, one who leaves the depot, and gets on the passenger train, for the purpose of meeting his wife and child, is not a passenger, and cannot recover for injuries sustained by falling into a culvert while stepping from the train. Stiles v. Railroad, 65 Ga. 370.

[5] Lucas v. Railroad Co., 6 Gray (Mass.) 64; Coleman v. Railroad Co., 84 Ga. 1, 10 S. E. 498; Griswold v. Railway Co., 64 Wis. 652, 26 N. W. 101; Missouri, K. & T. Ry. Co. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905; Texas & P. Ry. Co. v. McGilvary (Tex. Civ. App.) 29 S. W. 67; Dillingham v. Pierce (Tex. Civ. App.) 31 S. W. 203. The mere fact that a train fails to stop the usual and reasonable time to enable passengers to get on and off does not constitute negligence as to a person who gets on to assist a passenger, and who is injured in getting off after the train has started. International & G. N. R. Co. v. Satterwhite (Tex. Civ. App.) 38 S. W. 401. It seems to have been held at one time in Missouri that an escort of a passenger is entitled to have sufficient time to accompany the passenger to a seat, and then to leave the car. Doss v. Railroad Co. (1875) 59 Mo. 27; Stoneseifer v. Sheble, 31 Mo. 243. But these cases would seem to be overruled by Yarnell v. Railway Co., 113 Mo. 570, 21 S. W. 1, where it was held that a railroad company does not owe a duty to afford a reasonable opportunity to alight to a person escorting a passenger on a train, unless it has knowledge of the fact that

The duty to afford such an escort a reasonable opportunity to leave the train is dependent upon the knowledge of his purpose by those in charge of the train; for, without such knowledge, they may reasonably conclude that he entered to become a passenger, and may cause the train to be moved after allowing him a reasonable time to get on board. The law could not, in reason and justice, impose as a duty the doing of that which, in the light of everything known to the trainmen, would not appear necessary or proper, nor hold that the cars should be stopped when there is no reason to stop them.[6] But when a person is permitted, without objection, to enter a car in a railway train, at a station, to assist a passenger to a seat, and before entering he states to the conductor that he intends to get off, it is the duty of the conductor to so regulate the movement of the train as to give him a reasonable time to leave the car without injury.[7] So, where a passenger is in so enfeebled a condition as to require the assistance of others to carry him on the train, the train hands, who observe these facts, owe an obligation to those assisting and carrying him into the car to stop the train a sufficient length of time to give them a reasonable oppor-

he is merely an escort, and does not intend to become a passenger. In Keokuk Packet Co. v. Henry, 50 Ill. 264, it was held that there is no presumption that persons going aboard a steamboat at a regular stopping place do so with the intention of becoming passengers, so as to relieve the company from the duty of giving to a person accompanying a female passenger on the boat proper time and facilities to get ashore.

[6] Little Rock & Ft. S. Ry. Co. v. Lawton, 55 Ark. 428, 18 S. W. 543.

[7] Missouri, K. & T. R. Co. v. Miller (Tex. Civ. App.) 39 S. W. 583.

tunity to leave.[8] So, where a conductor of a street car is informed that a person boarding the car with another is not a passenger, and he sees such person turn, and start to leave the car, it is a question for the jury whether he was guilty of negligence in starting the car before she got off.[9]

§ 238. SAME—PERSONS HAVING BUSINESS AT STATIONS.

It is the duty of a railroad company to exercise ordinary care to keep its station houses and platforms in a safe condition, and to furnish safe and easy ingress and egress to and from them for the benefit of all persons who have business at such station houses.[1] This duty

[8] Louisville & N. R. Co. v. Crunk, 119 Ind. 542, 549, 21 N. E. 31.

[9] Rott v. Railroad Co. (Super. N. Y.) 1 N. Y. Supp. 518. The fact that a person who attended a child in boarding a street car on a particular occasion, for the purpose of placing in the car small packages which the child was to have in charge, had frequently before done the same thing at the same place when the same driver was in charge, is admissible in evidence, as tending to show that the person on this particular occasion intended to get off after depositing the packages, as she had done on previous occasions, and did not intend to remain on board, so as to justify the driver in starting the car suddenly while she was engaged in getting off. Houston v. Railroad Co., 89 Ga. 272, 15 S. E. 323.

§ 238. [1] St. Louis, I. M. & S. Ry. Co. v. Fairbairn, 48 Ark. 491, 4 S. W. 50. There is no doubt that a higher degree of care and diligence is required towards a passenger than towards a stranger rightfully on the premises of a railroad company. In the former case, the utmost care and skill are required; in the other, only such diligence as would be exercised by prudent, skillful, and discreet men, having due regard to the rights and demands of the public, and a proper desire to protect life and property. Illinois Cent. R. Co. v. Phillips, 55 Ill. 194.

it owes to a person who goes to a station to mail a letter on a mail train,[2] or to procure a time-table to see whether there has been a change in the running time of trains;[3] to a hackman conveying a passenger to a depot for transportation;[4] and to a consignee of goods who goes on its premises to assist in the delivery of his goods, with its consent.[5] So, where the direct and usual path to a railroad company's depot lies over a side track on which freight cars often stand, and it is the custom of the company to leave an opening between them, so as not to obstruct the path, and this path is habitually

[2] Hale v. Railroad, 60 Vt. 605, 15 Atl. 300. But in Spence v. Railway Co. (1896) 27 Ont. 303, it was held that one who goes on the premises of a railway company to post a letter in the postal car of a train is a bare licensee, who goes on the premises solely for his own use, without any reciprocal advantage to the railway company; and hence the company is not liable to him for injuries sustained because of a defect in its premises, unless in the nature of a trap.

[3] Bradford v. Railroad, 160 Mass. 392, 35 N. E. 1131.

[4] Tobin v. Railroad Co., 59 Me. 183.

[5] Holmes v. Railway Co., L. R. 4 Exch. 254, L. R. 6 Exch. 123. Nor is a consignee so assisting in the delivery of his goods a servant of the carrier, within the fellow-servant rule. Wright v. Railway Co., L. R. 10 Q. B. 298, 1 Q. B. Div. 252. But under Act Pa. April 4, 1868, which provides that any person injured while lawfully engaged or employed on or about the premises or cars of a railway company of which he is not an employé shall have the same rights as an employé, a consignee who goes to a railroad depot to receive his goods takes the risk upon himself. Gerard v. Railroad Co., 12 Phila. 394. A stock owner, or a friend or agent for him, may rightfully go upon the platform at a railroad station to examine a notice of killing stock by trains, which the statute requires to be posted there; and if, in the exercise of ordinary care, he is injured from a defect in the platform which could have been avoided by ordinary care of the company, he may recover for the injury. St. Louis, I. M. & S. Ry. Co. v. Fairbairn, 48 Ark. 491, 4 S. W. 50.

used by the patrons and employés of the company, with the knowledge and without the disapproval of the officials, it may be assumed that the company invites persons having business at the depot to use that path between the cars; and if, by a sudden, unsignaled act of the company's servants, the cars are run together, thereby crushing a person who was on his way to the depot, the company is liable in damages for the injury.[6]

§ 239. SAME—LICENSEES AT STATIONS.

One who goes to the station house of a railroad company, not for the purpose of any business, or to meet expected friends, or to see others depart, but as a mere spectator, for his own pleasure and convenience, is there at his own risk and peril, and cannot recover damages for personal injuries received in consequence of a defective platform or station grounds. To entitle such a person to recover, he must show such gross and wanton negligence on the part of the company as is equivalent to intentional mischief.[1] Within this class is included a person who goes to a station for shelter from a storm;[2] one who goes to a telegraph office, not a station, maintained by a railroad company near its track, to pay the operator a friendly visit;[3] one who goes on the land of a railroad company, near a mail crane, to witness a catch of the mail pouch by the postal clerk on the train while it is in motion;[4] and one

[6] Nichols' Adm'r v. Railroad Co., 83 Va. 99, 5 S. E. 171.

§ 239. [1] Burbank v. Railroad Co., 42 La. Ann. 1156, 8 South. 589.

[2] Pittsburgh, Ft. W. & C. Ry. Co. v. Bingham, 29 Ohio St. 364.

[3] Woolwine's Adm'r v. Railway Co., 36 W. Va. 329, 15 S. E. 81.

[4] Poling v. Railroad Co., 38 W. Va. 645, 18 S. E. 782.

who goes to a railroad station to see and hear the president of the United States, who is being carried over the railroad on a special excursion train.[5]

§ 240. SAME—TRESPASSERS ON TRAINS.

The only duty due by a railroad company to one who is an intruder or a trespasser on its train is to refrain from wantonly, willfully, or intentionally injuring him. It is not liable for an injury caused by the mistake, inadvertence, or negligence of its employés.[1] Thus, a trespasser riding on a hand car at night cannot complain of the company's failure to have a headlight on an approaching locomotive;[2] nor can one who climbs on a moving freight car recover for injuries sustained in being thrown off by reason of a concussion of the car with another.[3] But, after discovering that a trespass-

[5] Gillis v. Railroad Co., 59 Pa. St. 129.

§ 240. [1] Railroad v. Meacham, 91 Tenn. 428, 19 S. W. 232; Chicago, B. & Q. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812, 44 Ill. App. 124; Darwin v. Railroad Co., 23 S. C. 531. "To the trespasser on its trains, just as to trespassers on its track, the railroad company owes precisely the same duty which it owes to all mankind; and this duty is exactly what each man owes to every other, viz. abstention from wanton and willful injury in the use of one's property." Alabama G. S. R. Co. v. Harris, 71 Miss. 74, 14 South. 263. One who rides on a freight train, with the intention of stealing a ride, without invitation or sufferance of the train hands, is a trespasser, to whom the company owes no duty, save not to willfully or recklessly injure him after discovering him on the train. Farber v. Railway Co., 116 Mo. 81, 22 S. W. 631. Although a person stealing a ride on a freight train is a trespasser, the servants of a railroad company have no right to recklessly and wantonly inflict injury on him. Planz v. Railroad Co., 157 Mass. 377, 32 N. E. 356. As to ejection of trespassers, see post, § 359.

[2] Eastern Kentucky Ry. Co. v. Powell (Ky.) 33 S. W. 629.

[3] Buckley v. Railroad Co., 43 N. Y. Super. Ct. 187. A trespasser

er or volunteer on its road or cars has placed himself in a position of danger, the servants of a railroad company must exercise reasonable care to avert the danger.[4] In some states, however, it is held that a railroad company owes the duty of exercising care towards a person wrongfully riding on a train, with the knowledge and consent of the conductor;[5] but the true rule would seem to be that such knowledge does not impose on the company the duty of exercising care for his safety.[6] In

who was injured while trying to climb upon a car in a slowly moving freight train, which he was prevented from doing by a brakeman, cannot recover damages from the railroad company, unless the injury was caused by the use of unnecessary force by the brakeman. Louisville & N. R. Co. v. Bernard (Ky.) 37 S. W. 841. A yard master who jumps on the side ladder of a passing freight train, and in that position rides into the yards of another company, to ascertain whether any cars are to be transferred, is, while so riding, a trespasser; and the other company is not liable for injuries sustained by him in its yards, caused by being struck by a switch, and thrown from his position. Grunst v. Railway Co. (Mich.) 67 N. W. 335.

[4] Pettit v. Railway Co., 58 Minn. 120, 59 N. W. 1082; Id., 62 Minn. 530, 64 N. W. 1019.

[5] See ante, § 220. In Berry v. Railway Co., 124 Mo. 224, 25 S. W. 229, it was held, per Black, C. J., and Brace and Barclay, JJ., that a railroad company owes the duty of exercising ordinary care to persons on a construction train with the knowledge and consent of the train hands, though they paid no fare, and are not entitled to the protection of passengers. It was said: "Persons in charge of a train are not ordinarily under any duty to look out for trespassers; but, when a person is known to be on a train by those in charge of it, they are in duty bound to use ordinary care to avoid injuring him, though he may be a wrongdoer. Knowledge of the presence of the wrongdoer carries this duty. A failure to use ordinary care under such circumstances is but little short of willful injury." Sherwood, Gantt, and Burgess, JJ., dissented, and held that to persons not passengers,

[6] McNamara v. Railway Co., 61 Minn. 296, 63 N. W. 726.

Iowa, a statute [7] renders a railroad company liable for "all damages sustained by any person * * * in consequence of the neglect of agents, or by any mismanagement of engineers or other employés." Under this statute, willfulness or an actual intent to injure is not necessary to render the company liable for injuries to a person wrongfully on one of its trains.[8]

§ 241. SAME—TRESPASSING CHILDREN.

As a general rule, an owner of property is under no different a duty towards trespassing children than towards trespassing adults. One difference, however, exists. It is this: The owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to play with it, and be injured, is bound to use reasonable care to protect such children from the danger to which they are thus exposed.[1] The line of argument adopted in support of this rule is that such

but trespassers on its trains, the company is not liable except for gross negligence and willful wrong. Id. 339.

[7] Code Iowa, § 1307; McClain's Code 1888, § 2002.

[8] Way v. Railway Co., 73 Iowa, 463, 35 N. W. 525. In Texas & P. Ry. Co. v. Watkins, 88 Tex. 20, 24, 29 S. W. 232, it is said: "The doctrine held by some courts, that a railway owes no duty to a trespasser wrongfully on its tracks, has never been adopted in this state, but has been expressly repudiated. It is the duty of the servants of a railway company operating its trains to use reasonable care to discover persons on its track, and a failure to use such care is negligence on the part of the company, for which it is liable in damages for an injury resulting therefrom, unless defeated by evidence of contributory negligence on the part of the person injured."

§ 241. [1] Lynch v. Nurdin, 1 Q. B. 29; Railroad Co. v. Stout, 17 Wall. 657; Keffe v. Railway Co., 21 Minn. 207.

machinery, being attractive to young children, presents to them a strong temptation to play with it, and thus allures them into a danger whose nature and extent they, being without judgment and discretion, can neither apprehend nor appreciate, and against which they cannot protect themselves; that such children may be said to be induced by the owner's own conduct to come upon the premises; that what an express invitation is to an adult an attractive plaything is to a child of tender years; that, as to them, such machinery is a hidden danger,—a trap.[2]

This principle has been generally applied against railroad companies in what are known as the "Turn-Table Cases." [3] Some of the courts have applied the same principle to children riding on street cars and trains. "The duty resting upon a street-railroad company to employ the proper precautions to avoid injury to children entering its cars would comprehend the exercise of reasonable diligence to guard and shield from danger a child not of the age of discretion to understand and appreciate the peril of riding in an unsafe and exposed position. Accordingly, it would generally be negligence to allow such a child to ride upon the steps of the front platform when his presence in a situation thus exposed to danger is actually known, or the circumstances are such as would make failure to note his peril palpable neglect and inattention to duty on the part of those having the control and management of the

[2] Twist v. Railroad Co., 39 Minn. 164, 39 N. W. 402.

[3] Railroad Co. v. Stout, 17 Wall. 657; Keffe v. Railway Co., 21 Minn. 207; Twist v. Railroad Co., 39 Minn. 164, 39 N. W. 402.

car." [4] So, it has been held that the train hands of a railroad company who permit a passenger car to stand on a side track, within a few feet of a depot, must exercise ordinary care to ascertain whether there are any trespassing children in it before they back against other cars for the purpose of coupling them together; and failure to exercise care for this purpose renders the company liable for injuries sustained, in the concussion, by children inside the car, though the train hands did not know they were there.[5] It has even been held that a railroad company is liable for injuries to a trespassing boy who climbed on a moving train at a public street crossing, if its employés could have ascertained his position of danger by the exercise of ordinary care.[6]

[4] Wynn v. Railway Co., 91 Ga. 344, 17 S. E. 649. In some of the cases the principle has been so applied as to require the servants of the carrier to exercise care for the safety of a child riding on the vehicle by their invitation. New Jersey Traction Co. v. Danbech (N. J. Sup.) 31 Atl. 1038; Cook v. Navigation Co., 76 Tex. 353, 13 S. W. 475. Where a child, deaf and dumb, and 10 years of age, is led to frequent the cars of the company, in ignorance of the danger and the illegality of the act, by the well-meant, though injudicious, kindness of the employés, and is hurt through their negligence while they are performing services within the scope of their employment, the company cannot escape liability on the mere ground that the child was there without having permission under the lawful rules and regulations of the corporation managing the railroad. Lammert v. Railroad Co., 9 Ill. App. 388.

[5] Louisville & N. R. Co. v. Popp (Ky.) 27 S. W. 992.

[6] Thompson v. Railway Co. (Tex. Civ. App.) 32 S. W. 191. In Hicks v. Railroad Co., 64 Mo. 430, it was held that a boy on a station platform, built for the accommodation of passengers, though he has no business there, is not a trespasser, and willfulness and wantonness need not be proved to render the company liable for an injury caused by his being struck by a piece of timber projecting from

But the true rule undoubtedly is that a railroad company owes no duty of active vigilance to keep boys out of its station yards, or from jumping on moving trains while in such yards or on its tracks. Such boys are trespassers, and the company owes no duty to them, except that of not wantonly or recklessly injuring them after discovering them to be in peril.[7] Boys, 15 and 17

a freight car two feet over the station platform. Hicks v. Railroad Co., 64 Mo. 430. But in Baltimore & O. R. Co. v. Schwindling, 101 Pa. St. 258, it was held that a railroad company owes no duty to a boy who stands on the edge of the station platform, without any invitation from its agents and employés, and having no business with them; and hence there can be no recovery for injuries sustained by being struck by a slight projection from the side of a passing freight car. As will appear from the next paragraph, the Pennsylvania decision is correct.

[7] Barney v. Railroad Co., 126 Mo. 372, 28 S. W. 1063; Catlett v. Railway Co., 57 Ark. 461, 21 S. W. 1062; Chicago & A. R. Co. v. Lammert, 12 Ill. App. 408. A railroad company is not liable for injuries to a small boy who is enticed onto a slowly moving train by other boys riding thereon by permission of the brakeman, and who falls off while climbing the steps of the rear car, where there is no evidence that the brakeman at his post of duty saw him. Woodbridge v. Railroad Co., 105 Pa. St. 460. A railroad company is not responsible for the death of a 13 year old boy, who rode some distance on a wild train, stepped from it while in motion, retaining his hold on the railing, and, running along for a short distance, then swung himself back onto the car step, from which he fell or jumped while the train was in motion, where there is no evidence that the train hands saw his position of peril. Powers v. Railway Co., 57 Minn. 332, 59 N. W. 307. A boy eight years old, standing near a railroad track as a freight train passed along on a sharp upgrade, at a speed of eight miles an hour, was warned by the engineer to get away. He stepped back, but came up to the train again, and seized the mounting appliance attached to the end of a car, and hung on. The fireman saw him, and made motions warning him to get off. In doing so, he fell under the moving train, and was injured. Held,

years old, playing about moving cars, jumping on and off, must take the risk of life and limb if they will persist in such dangerous sport.[8] So, a street-car company which is hauling two empty cars over its track to its repair shop is under no obligation of keeping watch to see that boys do not jump on the car while being so driven; and a boy who jumps on the car while in motion, and is injured by falling off or jumping off, cannot recover where the driver was ignorant of his presence on the car.[9] It has even been held that train hands making up a freight train are not obliged to be on the lookout to prevent trespassing boys from entering cars standing on a side track.[10] So, a railroad company

that the railroad company was not liable, as the failure to stop the train and remove the boy (which it was not shown could have been safely done) did not amount to willfulness. Pittsburgh, C., C. & St. L. Ry. Co. v. Redding, 140 Ind. 101, 39 N. E. 921.

[8] Michaud v. Railway Co. (Me.) 34 Atl. 172.

[9] Bishop v. Railroad Co., 14 R. I. 314.

[10] Curley v. Railway Co., 98 Mo. 13, 10 S. W. 593. A railroad company which stops its freight trains at a crossing with another road, near a school house, is not under any obligation to exercise active vigilance to see that children do not board a train while so stopping; and, if none of its employés know of the attempt of a child to climb the train, it is not liable for injuries sustained by his being thrown from the car by the starting of the train. Atchison, T. & S. F. R. Co. v. Plaskett, 47 Kan. 107, 26 Pac. 401. Where a boy gets on the footboard of a switch engine in a railroad yard, the engineer owes him no duty of care, unless he actually sees him there. Hughes v. Railway Co., 65 Mich. 10, 31 S. W. 603. It is not within the scope of the employment of a baggage master connected with a railway train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter and ride on a passenger coach in such a train. Hence his permission to a number of little girls to get on a coach in a passenger train while it is being switched on a side track for the night does not create the relation of passenger

owes no duty of care to a boy who, instead of going around cars standing on a private switch, undertakes to go through them, without the knowledge of any of the company's employés, and who is killed by a lurch of the train, which causes a sliding door on the side of the car to close against the boy's head.[11]

Of course, no liability can attach against a railroad company if it has not even been guilty of negligence in its treatment of trespassing children. Thus, a railroad company is not liable for the death of a boy who

and carrier between the company and the girls. Reary v. Railway Co., 40 La. Ann. 32, 3 South. 390. A boy who gets on a car in a freight train, without the knowledge of the train hands, is not a passenger; and hence the company is not bound to use the utmost care and diligence which human foresight is capable of to avoid injuring him. State v. Baltimore & O. R. Co., 24 Md. 84.

[11] Bollinger v. Railroad Co., 47 La. Ann. 721, 17 South. 253. In Mexican Nat. Ry. Co. v. Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126, it is said: "Where a child of tender years is injured while standing in the door of a freight car belonging to a railroad company, the degree of care to be exercised by the company depends on the circumstances under which the child came there, to wit: (1) If he was in the car at the invitation, either express or implied, of the servants of the company, it was the duty of the company and its servants to exercise ordinary care towards the child to prevent him from being injured, and to abstain from doing anything which would reasonably result in his injury, taking into consideration his tender years. (2) If he was there merely with the consent and knowledge of the company's servants in control of the cars, and engaged in transferring freight, a different rule of measuring the company's duty would obtain. Mere acquiescence or permission of the company or its servants in being in the car would create no duty on the part of the company, except to refrain from acts willfully and knowingly injurious to him. (3) If he was not upon the cars at the invitation of the company, or by its permission, he was an intruder; and in that event he was not entitled to recover, except for injuries knowingly or willfully inflicted."

stealthily got on a slowly-moving locomotive, and who fell from it by reason of a jar caused by its stopping in the usual and ordinary manner.[12] So, where a boy stealing a ride on the front platform of a street car has been repeatedly warned off, and once put off by the driver, the driver, whose attention was taken up with passengers who had just gotten on the car, cannot be deemed guilty of negligence in failing to notice that the boy had again gotten on the front platform.[13]

[12] Miles v. Receivers, 4 Hughes, 172, Fed. Cas. No. 9,544.

[13] Wrasse v. Traction Co., 146 Pa. St. 417, 23 Atl. 345. Failure of the driver of a street car to compel a boy, who had jumped on the platform, to leave it, does not render the company liable as for a permissive riding on the front platform, where the attention of the driver was properly directed to a switch which he was approaching when the boy got on, and where it appears that the boy was not on the car exceeding 30 seconds when he jumped off and was injured. Hestonville, etc., R. Co. v. Kelley, 102 Pa. 115. No negligence on the part of a street railway is shown by the fact that a 13 year old boy, without the knowledge of the conductor, seated himself on the front platform of a crowded car, in such a position that he was struck on his projecting knees by a mortar box in the street. Butler v. Railway Co., 139 Pa. St. 195, 21 Atl. 500.

CHAPTER XVIII.

DUTY TO ACCEPT AND CARRY PASSENGERS.

§ 242. Carrier must Accept All Proper Persons.
243. Who may be Rejected.
244. Same—Business Rivals.
245. Same—Exclusive Station Privileges.
246. Same—Waiver of Right to Reject.

§ 242. CARRIER MUST ACCEPT ALL PROPER PERSONS.

A common carrier of passengers, upon being paid or tendered the usual fare, must receive and carry all persons who offer themselves as passengers to whose character and conduct there is no reasonable objection, provided there is room in the conveyance.

The idea that lies at the very base of the law of common carriers, both of property and of persons, is that they are public servants, and serve all alike.[1] By engaging in the business of a common carrier, the owner of a vessel or vehicle devotes it to a public use, and everybody constituting a part of the public is entitled to an equal and impartial participation in its use. This principle has been announced by the courts as a part of the common law,[2] and has been enacted as a statute

§ 242. [1] Samuels v. Railroad Co., 31 Fed. 57.

[2] Bennett v. Dutton (1839) 10 N. H. 481; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Pearson v. Duane, 4 Wall. 605.

in some of the states.[3] This principle is applicable with special force to railroad companies. "Railroads are creatures of the law, and are intrusted with the exercise of sovereign powers to promote the public interest, and are therefore bound to conduct their affairs in furtherance of the public objects of their creation. The interest of stockholders in their profits is secondary, and in the main subsidiary to the interests of the public. It is in view of their public character that the courts are authorized to determine and enforce the public duties enjoined on them. The duties which they owe to the general public and the state cannot be shirked or evaded." [4] Under this principle, it has been held that one who has purchased a full fare ticket has a right of action against a railroad company for refusing him admittance to a regular passenger train, and compelling him to wait two hours, and take a crowded excursion train, filled with disorderly passengers, paying half-fare rates.[5] So, the keeper of a public ferry is

[3] How. Ann. St. Mich. § 3324; 2 Comp. Laws Utah 1888, p. 604, § 4562; Comp. Laws Dak. § 3882.

[4] People v. St. Louis, A. & T. H. R. Co. (Ill. Sup.) 45 N. E. 824.

[5] Brassfield v. Railway Co., 19 Mo. App. 651; Alley v. Railway Co. (Tex. Civ. App.) 35 S. W. 735. Where a passenger train is scheduled to stop at a flag station on the proper signal being given, failure to stop the train, if the trainmen see the signal, and willfully run by the station, is a violation of How. Ann. St. Mich. § 3324, which provides a penalty for the refusal of railroad companies to take and transport passengers without legal or just excuse. Freeman v. Railroad Co., 65 Mich. 577, 32 N. W. 833. But the failure to stop a train at a regular station does not give a right of action to a passenger who was at the station waiting to take it, and who took passage on a freight train the same night, though he was chilled with cold and suffered mental distress by reason of being left, in the absence of any pe-

liable to an action on the case for damages resulting from a refusal to set a passenger across the stream over which he keeps his ferry, though there is a statute giving a fixed penalty for such neglect of duty.[6]

§ 243. WHO MAY BE REJECTED.

A common carrier may exclude all persons from its vehicles whom it has reasonable grounds to believe will injure or annoy their fellow passengers. This is manifestly just, since, as we have seen,[1] the admission of such persons to its vehicles is negligence, which renders the carrier liable for the injuries which they may inflict on their fellow passengers.[2] Thus, a carrier has the right to exclude from its train a person, not accompanied with proper attendants, whom its servants know to be dangerously insane, though at the time of offering to become a passenger he was apparently harmless, and conducted himself in no way different from other

cuniary damage or of any personal injury resulting in any loss. Martin v. Railroad Co., 32 S. C. 592, 10 S. E. 960.

[6] Wallen v. McHenry, 3 Humph. (Tenn.) 245. A ferryman is not liable to the statutory penalty for failure to transport a passenger across the Ohio river from Ohio to Kentucky, since the Kentucky statute requires ferrymen to transport only from Kentucky to the opposite shore. Reeves v. Little, 7 Bush (Ky.) 469.

§ 243. [1] Ante, § 96 et seq.

[2] Code Ga. 1882, § 2082, provides that common carriers of passengers may refuse to admit or may eject from their conveyances all persons refusing to comply with reasonable regulations, or guilty of improper conduct, or of bad, dissolute, doubtful, or suspicious characters. So they may refuse to convey persons seeking to interfere with their own business or interests. As to the ejection of passengers from vehicles, see post, c. 24.

persons applying for passage.[3] So, a railroad company is not bound to receive any person as a passenger who is drunk to such a degree as to be disgusting, offensive, disagreeable, or annoying; and a person so drunk as to be likely to violate the common proprieties, civilities, and decencies of life has no right to a passage while in that condition.[4] So, gamblers and monte men, whose purpose in traveling on a train is to ply their vocation, may be excluded.[5]

But the mere fact that a female passenger is not of chaste character does not justify her exclusion from the train, where her deportment and conduct in public places have been unexceptional. "The carrier has

[3] Meyer v. Railway Co., 4 C. C. A. 221, 54 Fed. 116.

[4] Pittsburgh, C. & St. L. Ry. Co. v. Vandyne, 57 Ind. 576; Wills v. Railroad Co., 129 Mass. 351; O'Neill v. Railroad Co., 155 Mass. 371, 29 N. E. 630. As to ejection of intoxicated persons from vehicle, see ante, § 112, and post, § 329.

[5] Thurston v. Railroad Co. (1877) 4 Dill. 321, Fed. Cas. No. 14,019. In this case, Dundy, J., said: "The railway company is bound, as a common carrier, when not overcrowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business is to injure its line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business." In Pearson v. Duane, 4 Wall. 605, it is said that a carrier may refuse passage to a person bound for a city from which he has been banished by a vigilance committee, then in supreme control of the city, if, in the carrier's opinion, his return would promote further difficulty, and create public disorder.

nothing whatever to do with private character or conduct, except so far as it furnishes him with evidence of a probable injury about to be inflicted on his other passengers or his business. He must carry all who come properly dressed, and who behave genteelly, and cannot classify them according to their general moral reputation." To permit a railroad company to do so would practically place the character of every woman, virtuous or not, for trial before every railroad conductor; and the reputation of her private life might be at any time called in question by him.[6] The fact that the holder of a commutation ticket, who has left it at home by inadvertence, refuses to pay his fare, except on condition that it be refunded on his presentation of the commutation ticket the next day, does not justify the company in refusing to sell him commutation tickets thereafter.[7] So, a carrier cannot reject a person as a passenger, otherwise qualified, on the sole ground that he is blind.[8]

[6] Brown v. Railroad Co., 7 Fed. 51.

[7] State v. Railroad Co., 48 N. J. Law, 55, 2 Atl. 803. Discharged railroad laborers, who are entitled to carriage free of charge, may go on a train peacefully, and remain there until carried to destination; but if the conductor refuses to carry them, stops the train, and undertakes to detach the mail car, and to send it forward with the mail, they are guilty of obstructing the passage of the mail if they prevent him from so doing in order to compel him to carry them on the train. U. S. v. Kane, 19 Fed. 42.

[8] Zackery v. Railroad Co. (Miss.) 21 South. 246.

§ 244. SAME—BUSINESS RIVALS.

A common carrier of passengers may refuse to carry a person whose object in taking passage is to solicit other passengers to give their patronage to business rivals of the carrier. The vessel or vehicle which the carrier uses is his own; and except to the extent to which he has devoted it to the public use, by the business in which he has engaged, he may manage and control it for his own profit and advantage, to the exclusion of all other persons. The leading case on this subject is Jencks v. Coleman,[1] decided in 1835, in one of the federal district courts. In this case it was held that a passenger was rightly refused admittance to a steamer where his sole object was to solicit other passengers to complete their journey, after leaving the steamer, on a rival line of stagecoaches. So, also, a carrier may establish, for the convenience of passengers, and for his own profit, on his car or vessel, an agency for the delivery of baggage of passengers, and of express matter, and exclude all other persons from entering, to solicit or receive orders from passengers in competition with the agency established by him. This is in no just sense a monopoly. It is simply saving to the carrier a legitimate advantage which his position and business give him.[2] The fact that a carrier waives his rights, in this respect, in regard to one person, does

§ 244. [1] 2 Sumn. 221, Fed. Cas. No. 7,258. The case was tried before Mr. Justice Story. Daniel Webster was one of the counsel for plaintiff, and it was reported by Charles Sumner.

[2] Barney v. Steamboat Co., 67 N. Y. 301; The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 4,092.

not bind him to waive them in regard to another person.[3] It has even been held that a railroad corporation may exclude all persons whom it pleases when they come to transact their own private business with passengers or other third persons, and admit whom it pleases when they come to transact such business. This applies to persons selling lunches to passengers, or soliciting orders from passengers for the sale of lunches.[4]

But in Florida it has been held that a rule of a railroad company which prohibits passengers on its trains from wearing the uniform of a line of steamers running in opposition to a line of steamers having a traffic arrangement with the railroad company is not reasonable, and hence not binding on the public, and the expulsion of a passenger for wearing such uniform is illegal.[5] So, it is not a lawful excuse for the refusal of the proprietors of a stagecoach to accept a passenger that they have a traffic agreement with the proprietor of a connecting line of coaches, whereby they have agreed not to receive passengers who have come on a rival line of coaches over the route traversed by the connecting line.[6]

[3] The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 4,092.

[4] Fluker v. Railroad Co., 81 Ga. 461, 8 S. E. 529. A passenger on a steamer chartered for an excursion has no right to sell merchandise on the boat (peanuts, popcorn, watermelons, and the like) without permission of those in charge of the boat. Smallman v. Whilter, 87 Ill. 545.

[5] South Florida R. Co. v. Rhodes, 25 Fla. 40, 5 South. 633.

[6] Bennett v. Dutton, 10 N. H. 481.

§ 245. SAME—EXCLUSIVE STATION PRIVILEGES.

By the weight of authority in this country, a railroad company cannot legally give to one hack and omnibus company the right to the use and the occupancy of a portion of its depot grounds, to the exclusion of others engaged in the like business of the carriage of freight and passengers from its depot. To permit a railroad company to do so is against public policy, since it would thereby be enabled to control largely the transportation of passengers and merchandise beyond its own line, and would establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public. Such a regulation also violates a constitutional or a statutory prohibition against discriminations in charges or facilities for transportation of freight and passengers.[1] But a rule by which a railroad company reserves the right to assign places upon its own grounds to the different hackmen, and to exclude from such places others not

§ 245. [1] Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667; Montana Union Ry. Co. v. Langlois, 9 Mont. 419, 24 Pac. 209; Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106; McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15. In England the rule seems to be that the granting of exclusive station privilege is unlawful, if delay and inconvenience result to the public by reason of such an arrangement, but otherwise not. In re Marriott, 1 C. B. (N. S.) 499; Beadell v. Railroad Co., 2 C. B. (N. S.) 509; Ex parte Painter, Id. 702; Barret v. Railroad Co., 1 C. B. (N. S.) 423; Barker v. Railway Co., 18 C. B. 46. See, also, in support of proposition in text, Summitt v. State, 8 Lea (Tenn.) 413; In re Palmer, L. R. 6 C. P. 194; In re Parkinson, Id. 554.

assigned thereto, is reasonable, and the company has a right to enforce it.[2]

In Massachusetts and New York, however, a different rule prevails. A common carrier of passengers and their baggage to and from a railroad station has no right, without the consent of the company, to use the grounds, buildings, and platforms of the station to solicit the patronage of passengers; and a regulation of the company which allows such use by particular persons, and denies it to others, violates neither the common law, nor a statute which requires railroad companies to give all persons reasonable and equal terms, facilities, and accommodations for the use of its depot and station grounds.[3] The reasoning in support of these cases is the same as that in the preceding section, under which the courts have virtually held that a common carrier has the right to grant exclusive privileges to solicit the patronage of passengers on its train or boat. But, while a railroad company may make such a discrimination, it has no right to exclude from its premises a hackney coach ordered by a passenger to

2 Cole v. Rowen, 88 Mich. 219, 50 N. W. 138. In this case it was said: "They [the rules] in no manner give place to one hackman to the exclusion of another; and they deprive no common carrier of necessary approach to the depot grounds to carry on his business of carrier of freight and passengers. The rules touch and affect all alike. The mere fact that the railroad company fixes and determines the place where each particular hack shall stand is not a discrimination between hackmen, but is a necessary rule to prevent quarrels for place, so often seen among hackmen around depots."

3 Old Colony R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89; Brown v. Railroad Co., 75 Hun, 355, 27 N. Y. Supp. 69; New York Cent. & H. R. R. Co. v. Sheeley (Sup.) 27 N. Y. Supp. 185; New York Cent. & H. R. R. Co. v. Flynn, 74 Hun, 124, 26 N. Y. Supp. 859.

meet him on an incoming train. The driver of such a coach is not engaged in his vocation of soliciting patronage, but is waiting to take one with whom a contract has already been made.[4] So, a regulation by which a railroad company excludes all persons of a certain class from its station grounds, without any discrimination against any member of the class, is valid. Thus, a regulation excluding innkeepers or their agents from the station platfrom for the purpose of soliciting passengers to patronize their houses is reasonable, and an innkeeper who knowingly violates the regulation may be ejected.[5]

§ 246. SAME—WAIVER OF RIGHT TO REJECT.

A common carrier who receives a person for transportation with knowledge of facts which would authorize his rejection as a passenger cannot expel him during the journey, except for misbehavior.[1] A case de-

[4] Griswold v. Webb, 16 R. I. 649, 19 Atl. 143. In this case the court said: "No question is made that a passenger may have his own carriage enter the premises of a carrier to take him away; but to say that one who is not so fortunate as to own a carriage shall not be allowed to call the one he wants, because it is a hackney carriage, would be a discrimination intolerable in this country. Yet this is really the plaintiff's claim. Every passenger has the right, upon the premises of the carrier, to reasonable and usual facilities for arrival and departure; and, so far as this includes the right to be taken to and from the station or wharf, it is immaterial whether he goes in a private or hired carriage."

[5] Com. v. Power, 7 Metc. (Mass.) 596; Harris v. Stevens, 31 Vt. 79; Landrigan v. State, 31 Ark. 50.

§ 246. [1] Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262. In Massiter v. Cooper (1803) 4 Esp. 260, the facts were as follows: Plaintiff, who had been disappointed of a seat in a mail coach, sent for a

cided by the supreme court of the United States goes even further, and holds that a person who has been accepted as a passenger cannot be expelled during the journey for causes which would have authorized his rejection as a passenger in the first place, even though the carrier was ignorant of the facts when the journey began.[2] But it would seem that the carrier, in justice, has a right to act when he first obtains knowledge of the facts.

chaise to defendant, who kept chaises for hire. It came, and plaintiff's luggage was tied on, and he got onto it. An exorbitant demand of fare was made, but afterwards defendant's servant agreed to take a smaller fare, which plaintiff offered to pay, but defendant refused to receive it, and took away his chaise. Lord Ellenborough said that "if a person is permitted to get into a chaise, and to put on his luggage, it is too late for the person who hires out the chaise to object to its going on the journey. If the passenger is in the chaise, and tenders the money, the owner of the chaise is bound to proceed on the journey. There is an inception of contract, and he is bound to complete it."

[2] Pearson v. Duane, 4 Wall. 605. In this case the facts were as follows: Duane had been banished from the city of San Francisco by the vigilance committee, then in supreme control, under penalty of death in case of his return. He went to Mexico, but shortly afterwards boarded a vessel bound for San Francisco. After being at sea for a few days, the master ascertained who he was, and compelled him to get on board a vessel bound for Mexico. It was held that the refusal to carry should precede the sailing of the ship; that, after the ship has gotten to sea, it is too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule in getting on board; and that, while the apprehended danger should be taken into consideration to mitigate damages, it did not afford a justification for the ejection of the passenger during the journey.

CHAPTER XIX.

CARRIER'S RULES AND REGULATIONS.

§ 247. Power of Carrier to Make.
248. Province of Court and Jury.

§ 247. POWER OF CARRIER TO MAKE.

A common carrier of passengers may make rules for the conduct of his business, and may require passengers to conform to them, if they are public, uniform in their application, and reasonable.[1]

The right of a railroad company to make reasonable rules for its protection, and for the safety and convenience of passengers, has never been denied.[2] Common carriers are very properly held to a strict measure of responsibility in cases of injuries to passengers. It is not unreasonable that they should have the right to require passengers to observe such proper regulations as are essential to their own convenience or safety.[3]

§ 247. [1] Civ. Code Cal. § 2186; Comp. Laws Dak. 1887, § 3895; Code Mont. 1895, §§ 2896, 2186.

[2] Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21; Sullivan v. Railroad Co., 30 Pa. St. 234; Deery v. Railroad Co., 163 Pa. St. 403, 30 Atl. 162; Crawford v. Railroad Co., 26 Ohio St. 580.

[3] Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21. It is not designed, in the present chapter, to gather up the various rules and regulations of common carriers that have been upheld by the courts. These are treated in connection with the various duties which the carrier is required to perform, and will be found grouped in the Index under the title, "Rules and Regulations."

On principle, it would seem that a passenger ought not to be bound to know the various rules and regulations which a common carrier may prescribe for the conduct of his business. They are not in the nature of public statutes enacted by the state, which every one is conclusively presumed to know. In addition to this, the rules and regulations of a railroad company, with its thousands of employés, must, of necessity, be many, and, to the uninformed, intricate. The passenger's purpose is travel or transportation to a given point, and the railroad officials must supply the details. Paying for the ticket the price demanded under the tariff of charges, he has done all required of him to secure his right of transit over the railway to the point or station to which he requested his ticket.[4] Nevertheless, the courts have very generally held that a passenger is bound to know certain regulations of the carrier. Among these may be mentioned regulations fixing the running time and stopping places for trains.[5] It is also very generally held that regulations of a railroad company may be waived by its duly-authorized agents.[6] In Pennsylvania, however, a distinction is made, in this respect, between regulations intended for the passenger's safety and those intended for his and the carrier's convenience. A conductor, it is said, cannot waive the former, but he may waive the latter.[7]

4 South & N. A. R. Co. v. Huffman, 76 Ala. 492.

5 See post, § 303.

6 See post, §§ 306, 307.

7 Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21; Deery v. Railroad Co., 163 Pa. St. 403, 30 Atl. 162.

§ 248. PROVINCE OF COURT AND JURY.

Where the facts are undisputed, the reasonableness of a regulation of a common carrier affecting the transportation of passengers is one of law for the court, and not of fact for the jury.[1] The necessity for this rule lies in the fact that it is only by this method that fixed and permanent regulations can be established. If the question were left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railway would be held liable, and in another, presenting the same questions, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the roads and to the public.[2]

§ 248. [1] St. Louis, A. & T. Ry. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711; St. Louis, I. M. & S. Ry. Co. v. Adcock, 52 Ark. 406, 12 S. W. 874; South Florida R. Co. v. Rhodes, 25 Fla. 40, 5 South. 633; Gregory v. Railway Co. (Iowa) 69 N. W. 532; Chilton v. Railway Co., 114 Mo. 88, 21 S. W. 457. But the question whether the facts are such in a given case that the regulation can be properly enforced may be for the jury. Hoffbauer v. Railroad Co., 52 Iowa, 342, 3 N. W. 1210. But in State v. Overton (1854) 24 N. J. Law, 435, and in Morris & E. R. Co. v. Ayers, 29 N. J. Law, 393, it was held that the reasonableness of regulations made by railroad companies with regard to the conduct of passengers is a question of fact for the jury. But in Compton v. Van Volkenburgh, 34 N. J. Law, 134, Beasley, C. J., said, in reference to these cases: "There is no doubt that the rule thus intimated is in opposition to recent American authorities. * * * The submission of such a question to the jury appears on many grounds objectionable, and in opposition to legal analogies."

[2] Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128, 144.

CHAPTER XX.

DUTY AS TO ACCOMMODATIONS.

§ 249. Must Furnish Reasonable Accommodations.
250. At Stations.
251. During Transportation—Seats.
252. Same—Heating Cars.
253. Sleeping Cars.
254. Chair Cars.
255. Separation of Passengers on Account of Sex.
256. Separation of Passengers on Account of Color.
257. Same—Statutes Requiring Separation.
258. Same—Statutes Requiring Equal Accommodations.

§ 249. MUST FURNISH REASONABLE ACCOMMODATIONS.

A common carrier of passengers is bound to furnish passengers the usual and reasonable accommodations incident to the mode of conveyance adopted by the carrier.

The contract of transportation includes, by implication of law, the ordinary comforts incident to the mode of conveyance adopted by the carrier, in the absence of express stipulations to the contrary. Statutes in some of the states expressly require the carrier to furnish reasonable accommodations for passengers,[1] and to furnish sufficient accommodations for all passengers reasonably to be expected to require carriage at any one

§ 249. [1] Civ. Code Cal. § 2181; Comp. Laws Dak. § 3841; Civ. Code Mont. 1895, § 2793; 1 Rev. St. S. C. 1893, § 1710.

time,[2] or offering themselves as passengers a reasonable time before the advertised starting time of the conveyance.[3] These statutes are probably merely a reenactment of the common law.

The supreme court of Illinois has recently held that a railroad company does not fulfill its duty to the public by attaching a passenger coach to a freight train, and the courts will compel it by mandamus to run a passenger train, where its business will warrant the expense of putting on such a train.[4]

[2] Civ. Code Cal. § 2185; Civ. Code Mont. 1895, § 2895; Comp. Laws Dak. § 3893.

[3] Mansf. Dig. Ark. § 5475; Rev. St. Ind. 1894, § 5185; Gen. St. Kan. 1889, § 1212; Ky. St. 1894, § 783; 1 How. Ann. St. Mich. § 3324; Ann. Code Miss. 1890, § 4306; Comp. Laws N. M. 1884, § 2671; Laws N. Y. 1850, c. 140, § 36; Code N. C. 1883, § 1963; Sayles' Civ. St. Tex. art. 4226. A carrier of passengers must not overload his vehicle. Civ. Code Cal. § 2102; Civ. Code Mont. 1895, § 2792; Comp. Laws Dak. § 3840. Every railroad corporation "shall furnish sufficient accommodations for the transportation of passengers and freight, and shall take, transport, and discharge all passengers to and from such stations as the trains stop at, from and to all places and stations on their said road, on the payment of fare." Comp. Laws Neb. 1893, c. 16, § 121, p. 312. Gen. St. Conn. 1888, § 3540, requires railroad companies, from the 1st of May to the 1st of November, annually, to carry through each passenger car, once an hour, a suitable quantity of good drinking water for the free use of passengers, with suitable appurtenances for carrying it, and a clean tumbler for using it. Laws N. Y. 1864, c. 582, requires railroad companies to furnish passenger cars with drinking water; and Code Ala. § 1155, requires them, in addition, to keep good lights on night trains.

[4] People v. St. Louis, A. & T. H. R. Co. (Ill. Sup.) 45 N. E. 824. The court said: "What we hold is that there cannot be a suitable and proper operation of the railroad as a carrier of passengers where the car in which it carries its passengers is part of a freight train, because freight trains are inferior to passenger trains, and travel in them is attended with less comfort, convenience, and safety than

§ 250. AT STATIONS.

The New York court of appeals has held that, at common law, a common carrier of passengers and freight is under no obligation to provide depots for passengers awaiting transportation, or warehouses for freight.[1] But where a station building has been erected by a railway company, to which passengers are invited while waiting for trains, a common-law duty rests on the company to provide reasonable accommodations for those who accept its invitation.[2] Thus, it

travel in passenger trains. The inferiority of a freight train to a passenger train as a mode of carrying passengers is so obvious that no man of ordinary understanding would regard the use of a freight train for the purpose of hauling a passenger car as a suitable and proper operation of the railroad in the matter of transporting passengers." It was further held that, in determining whether a railroad's business is sufficient to require it to run a separate passenger train, the court will take into consideration the business of the road as a whole, and not merely of the branch line on which it runs no passenger train. If the business of the whole road shows a large net profit, it will be compelled to run a passenger train on the branch line, which passes through a fairly populous country, with numerous towns, ranging in population from 200 to 5,000.

§ 250. [1] People v. New York, L. E. & W. R. Co., 104 N. Y. 58, 9 N. E. 856. It was further held that no such obligation is imposed by the general railroad act of New York (Laws 1850, c. 140), or the various amendments thereof, upon railroad corporations organized under it. The supreme court of the United States has also held that it rests entirely within the discretion of the company as to where it is best to locate its stations, and, in the absence of a statute or of a valid contract requiring the location at a certain place, a court has no authority, by mandamus, to compel its location there. Northern Pac. R. Co. v. Washington Territory, 142 U. S. 492, 12 Sup. Ct. 283, reversing 3 Wash. Ter. 303, 13 Pac. 604.

[2] McDonald v. Railroad Co., 26 Iowa, 124.

is the duty of a railroad company to use ordinary care in cold weather to heat the passenger waiting room for a reasonable time before the departure of its trains.[3] But a carrier is not liable because the agent at the depot was cross, and refused to inform an arriving passenger of the name of the town, or where she could find an hotel; and because, on her asking for water, he merely pointed to a tank some distance away, or because men and boys around the station jeered and laughed at her.[4]

In a number of states statutes exist which require railroad companies to maintain comfortable waiting rooms for passengers at stations; [5] and in others statutes exist requiring railroad companies to keep the

[3] Texas & P. Ry. Co. v. Cornelius (Tex. Civ. App.) 30 S. W. 720. Supp. Sayles' Rev. Civ. St. Tex. art. 4238, which requires every railroad company to keep its passenger houses warmed for one hour before the arrival of trains, does not relieve it from liability to a passenger who becomes ill because he had to wait several hours for a delayed train in a cold station room, though a fire may have been built within an hour of the actual arrival of his train. Id. But a passenger who is informed that a depot will not be opened during the night must use reasonable care to protect herself from the consequences of exposure to the inclement weather while waiting for a train, and the railroad company is not liable for a sickness caused by exposure which could have been avoided by her by the exercise of reasonable care. Texas & P. Ry. Co. v. Pierce (Tex. Civ. App.) 30 S. W. 1122. A railroad company is liable to an intending passenger for injuries sustained from its failure to keep its station open and warmed in inclement weather, as required by statute. Boothby v. Railway, 66 N. H. 342, 34 Atl. 157.

[4] Missouri, K. & T. Ry. Co. v. Kendrick (Tex. Civ. App.) 32 S. W. 42.

[5] Code Ala. § 1154; Rev. St. Ind. 1894, § 5188; Ky. St. 1894, § 772; Gen. Laws Minn. 1885, c. 190, § 1; Rev. St. Mo. 1889, § 2582; 1 Rev. St. S. C. 1893, § 1712.

ticket office or reception room open a specified length of time before the arrival and departure of trains.[6]

§ 251. DURING TRANSPORTATION—SEATS.

There can be doubt that the contract of a carrier of passengers by railway is one not only to furnish the passenger with transportation, but also with the comfort of a seat.[1] So, a common carrier which has agreed to transport one of its servants to and from work, as part of his compensation, cannot, through its train officials, lawfully require him to vacate a seat in the smoking car, to which he has been duly assigned, though the car has become crowded, and passengers are without seats.[2] So, where all the seats in the ordinary coaches of a railroad train are filled with passengers, one who has not obtained a seat does not become a trespasser by passing into the drawing-room car, and taking a seat, until seats in the other cars are vacated.[3] On the other hand, a passenger has no right to insist on a seat in a car already filled with passengers, where

[6] Ky. St. 1894, § 784; 1 How. Ann. St. Mich. §§ 3326, 3417; Ann. Code Miss. § 4313; Mill. & V. Code Tenn. § 2359; Code Va. 1887, § 1224; Code W. Va. 1891, p. 542, § 71a.

§ 251. [1] Hardenbergh v. Railway Co., 39 Minn. 3, 38 N. W. 625; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5; St. Louis, I. M. & S. Ry. v. Leigh, 45 Ark. 368; Camden & A. R. Co. v. Hoosey, 99 Pa. St. 492. See, also, ante, § 82. The duty to furnish a seat is imposed by statute in some of the states. Civ. Code Cal. § 2185; Civ. Code Mont. 1895, § 2895; Comp. Laws Dak. § 3804.

[2] New York, L. E. & W. R. Co. v. Burns, 51 N. J. Law, 346, 17 Atl. 630.

[3] Thorpe v. Railroad Co., 76 N. Y. 402, affirming 13 Hun (N. Y.) 70.

there are vacant seats in another car, with equal accommodations.[4]

In order that all passengers may obtain seats, a railroad company has the right to limit each passenger to a single seat;[5] and, where such a rule has been adopted, a passenger has no right to place his hand baggage on one seat, and occupy another, though other passengers are not thereby interfered with.[6]

What are the rights and duties of a passenger who has failed to obtain a seat? It is held that, on learning that he can get no seat, after he has gotten on the train, and it has attained a high rate of speed, he has a right to elect either to accept such accommodations as are offered, and pay fare, or to refuse to pay the fare unless he can have the accommodations to which a passenger is entitled. If he elects the latter course, then, inasmuch as he is not entitled to the passage without paying fare, even though no seat is provided him, it is his duty to leave the train on the first reasonable opportunity afforded him, which is the next regular stopping place. He may then bring his action for

[4] Pittsburgh, C. & St. L. R. Co. v. Van Houten, 48 Ind. 90.

[5] Louisville, N. O. & T. Ry. Co. v. Patterson, 69 Miss. 421, 13 South. 697. Code Tenn. 1884, § 2363, makes it the duty of the conductor to see that no passenger occupies more room than he pays for.

[6] Gulf, C. & S. F. Ry. Co. v. Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009. A regulation of a railroad company restricting passengers to the use of one seat if the cars are not crowded, and to the use of half a seat if they are, and not allowing the backs of seats to be turned towards each other, and not allowing passengers to place their baggage on seats, is a reasonable regulation, and is binding on a passenger, whether he knows of it or not. Gulf, C. & S. F. Ry. Co. v. Moody (Tex. Civ. App.) 30 S. W. 574.

breach of contract, and may recover as damages such sum as will compensate him for the breach, including such damages as are the natural and immediate results of the breach.[7] If he persists in his refusal to pay fare, and does not leave the train, and is ejected, he cannot recover for the injuries, either mental or physical, consequent on the ejection, provided no excessive force is used, but he may still recover for the breach of contract.[8]

§ 252. SAME—HEATING CARS.

It is the duty of a railroad company to properly and comfortably warm its coaches for its passengers, and especially so when there are women and children in the cars, and their discomfort is made known to the conductor or brakeman, and fires requested.[1] If a pas-

[7] Hardenbergh v. Railway Co., 39 Minn. 3, 38 N. W. 625; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5.

[8] St. Louis, I. M. & S. Ry. v. Leigh, 45 Ark. 368. A passenger, who refused to surrender his ticket until a seat was procured for him secured a seat at an intermediate station. He then tendered fare from the place where he secured his seat, but refused to pay fare for the distance previously traveled, or to surrender his ticket. Held, that the conductor had a right to eject him. Davis v. Railroad Co., 53 Mo. 317.

§ 252. [1] Ft. Worth & D. C. Ry. Co. v. Hyatt (Tex. Civ. App.) 31 S. W. 677. It is the duty of a railroad company to heat its cars in cold weather for the comfort of its passengers; and where a passenger repeatedly complained of the cold on a cool October night, and requested the conductor and brakemen to kindle a fire in the stoves on the car, and testifies that he ultimately suffered a severe sickness as a consequence of the cold contracted on the journey, the question of defendant's negligence is for the jury. Taylor v. Railroad Co. (Mo. Sup.) 38 S. W. 391.

senger contracts a disease by the failure of the carrier to keep up fire in a car in extremely cold weather, the carrier is liable.[2]

A passenger traveling by railroad in cold weather, in a car without a fire, is not guilty of contributory negligence, as matter of law, because he did not leave the car at some station, made no effort to procure additional wraps from his trunk in the baggage car, took off his overcoat at one time to give his wife the benefit of the warmth, and wore inadequate clothing to meet the demands of the climate and season.[3]

§ 253. SLEEPING CARS.

A sleeping-car company is bound to furnish a berth to a passenger holding a first-class ticket, if he applies for it at the proper time and in the proper manner, offers the customary fare, and there are vacant berths at its disposal.[1] But a rule of a railroad company requiring a passenger to have a first-class ticket for his transportation, before he can be assigned to a berth in a sleeping car, is a reasonable one, and can be legally enforced.[2]

A demand for a berth, and a promise to furnish it, constitute a contract, the mutual obligations and promises being a valid consideration. And it is no excuse for a sleeping-car company's breach of contract to reserve a certain berth for plaintiff that another person

[2] Hastings v. Railroad Co., 53 Fed. 224.

[3] Taylor v. Railroad Co. (Mo. Sup.) 38 S. W. 304.

§ 253. [1] Nevin v. Car Co., 106 Ill. 222.

[2] Pullman Palace-Car Co. v. Lee, 49 Ill. App. 75.

demanded it before plaintiff presented himself to pay for and occupy it, and that there was no other unoccupied.[3] By selling a passenger a ticket good for a particular berth, the company binds itself to furnish the particular berth in the car designated, or at least an equally desirable berth in the same locality in another car of equal safety, comfort, and convenience.[4] But a sleeping-car company has the right to sell a whole section to one person, and no cause of action arises from the refusal of its conductor to sell the upper berth in such section to another person, though that berth was in fact unoccupied, and though there were no other vacant berths in the car.[5] Where a sleeping-car company has reserved certain berths for passengers getting on at a certain station, and before the train reaches the station the conductor erroneously sells one of the berths so reserved, he may, a reasonable time before reaching such station, notify the passenger of his error, and tender another berth equal in accommodation; and the passenger has no cause of action if he refuses this, and voluntarily leaves the car.[6]

Ordinarily, a sleeping-car company is entitled to a reasonable time within which to comply with a passenger's request that his berth be made up by the por

[3] Pullman Palace-Car Co. v. Booth (Tex. Civ. App.) 28 S. W. 719.

[4] Pullman Palace-Car Co. v. Taylor, 65 Ind. 153.

[5] Searles v. Car Co., 45 Fed. 330. Where a berth in a sleeping car has been sold for occupancy to a certain point, no cause of action arises for the refusal of the conductor, before that point is reached, to sell another person a ticket entitling him to such berth from there to the end of the journey. Id.

[6] Mann Boudoir-Car Co. v. Dupre, 1 C. C. A. 540, 54 Fed. 646.

ter.[7] But though the company's rules require a person desiring to use the berth as a bed during the daytime to purchase an entire section, yet where a passenger, on purchasing a single-berth ticket, informs the conductor that he is suffering with rheumatism, and wants the berth to lie down on account of that sickness, he is entitled to the use of the berth as a bed in the daytime.[8]

A sleeping-car company imperatively owes to the traveling public the duty of seeing that men and women who do not occupy to each other the relation of husband and wife shall not occupy the same berth. But it has no right to deny the right to jointly occupy a berth to a husband and wife. When a berth is contracted for by the husband, either with an express understanding that it is engaged for the joint occupancy of himself and wife, or under circumstances that are not misleading within themselves, the refusal to permit such joint occupancy, without other reason than the difference of sex, would give the injured party a right of action for damages, in which might be considered circumstances of insult and aggravation attending the breach. But where a wife, traveling with

[7] Pullman's Palace-Car Co. v. Ehrman, 65 Miss. 383, 4 South. 113. In this case it was held that a passenger who requests that his berth be made up at 8:30 p. m., and who makes an angry demand on the porter to that effect when the latter states that he has some lunches to serve first, has no right of action against the sleeping-car company for the refusal, and for angry language used by the porter, where the berth was made up for him at about 9 o'clock, though he refused to occupy it then, and remained in the smoking saloon all night.

[8] Pullman Palace-Car Co. v. Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268.

her husband, pays for a separate berth, the company is not liable for the acts of its servant in compelling her to leave her husband's berth, with whom she retired during the night, unless such servant in fact knew that the relation of husband and wife existed.[9]

§ 254. CHAIR CARS.

The payment of first-class passenger fare does not entitle one to demand carriage in a car equipped with adjustable reclining chairs and lavatory, and served by a special porter. And where a railroad company furnishes sufficient first-class cars, with the usual appliances and service, for the accommodation of those entitled to first-class passage, and upon the same train carries a chair car which furnishes the extra service and accommodations above indicated, it may lawfully demand a reasonable extra compensation of passengers who from choice take passage upon it.[1] This right is not denied or restricted by the statute which limits the sum which railways may charge for first-class passage. Nor does the fact that a railway company advertises that chair cars will be run upon its road warrant the inference that such cars are free to all passengers under all circumstances.[2]

9 Pullman Palace-Car Co. v. Bales, 80 Tex. 211, 15 S. W. 785.

§ 254. 1 Wright v. Railway Co., 78 Cal. 360, 20 Pac. 740; Railway Co. v. Hardy, 55 Ark. 134, 17 S. W. 711.

2 Railway Co. v. Hardy, 55 Ark. 134, 17 S. W. 711.

§ 255. SEPARATION OF PASSENGERS ON ACCOUNT OF SEX.

A regulation of a railroad company that one car in a passenger train should be set apart, in the first instance, for females traveling alone, or with male relatives or friends, is reasonable. It tends to their comfort and security, and to the preservation of good order, which it is a duty of a carrier of passengers to be vigilant in seeking.[1] Such a rule the carrier has a right to enforce even to the extent of removing from the car a male person who enters it with no female under his care, and to use the force requisite for that purpose.[2]

So, where several railway companies have provided in their depot building in a large city separate waiting rooms for men and women, a regulation that no male passenger, unaccompanied with a female, shall be allowed to enter and remain in the women's room, is not only reasonable, but absolutely necessary, to enable the

§ 255. [1] Peck v. Railroad Co., 70 N. Y. 587; Bass v. Railway Co., 36 Wis. 450; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5.

[2] Peck v. Railroad Co., 70 N. Y. 587; Bass v. Railway Co., 36 Wis. 450. But in the last-cited case it was held that, if a male passenger enters the car peaceably, such entrance being neither barred nor forbidden by the officers, this must be regarded, under all the circumstances, as equivalent to a license to him to enter; and, if he is thus rightfully in the ladies' car, no officer of the train can rightfully remove him by force, at least without offering him a seat elsewhere. In Long v. Horne (1825) 1 Car. & P. 610, it was held that where a family of four ladies take inside places in a coach, saying they wish to travel together, it is a breach of agreement for the carrier to separate them.

companies to discharge a duty they owe the public of protecting females, while at the depot, from violence and insult.[3]

§ 256. SEPARATION OF PASSENGERS ON ACCOUNT OF COLOR.

Before the abolition of slavery in the United States it was held, even in nonslaveholding states, that while a common carrier had no right to refuse transportation to passengers on account of color, yet he had the right to separate them in his conveyances, and to assign to a colored passenger accommodations inferior to those enjoyed by a white passenger paying the same fare.[1] It was said that the natural, legal, and customary difference between the white and the black races made their separation as passengers in a public conveyance the subject of sound regulation, to secure order, promote comfort, preserve the peace, and maintain the rights both of carrier and passenger.[2]

After the Civil War, and the adoption of the thirteenth amendment to the federal constitution, which abolished slavery, and the fourteenth amendment, which prohibits states from making any law which

[3] Toledo, W. & W. Ry. Co. v. Williams, 77 Ill. 354.

§ 256. [1] Day v. Owen (1858) 5 Mich. 520; West Chester & P. R. Co. v. Miles, 55 Pa. St. 209. In Roberts v. City of Boston, 5 Cush. 198, the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools.

[2] West Chester & P. R. Co. v. Miles, 55 Pa. St. 209.

shall abridge the privileges or immunities of citizens of the United States, or from depriving any person of life, liberty, or property without due process of law, or denying any person the equal protection of the laws, it seems to have been thought by some of the state courts that common carriers had no power to separate passengers on account of race or color. Thus, in 1873, Chief Justice Dillon,[3] of the supreme court of Iowa, said: "A common carrier of passengers has no authority to enforce and establish regulations depriving colored persons of the privileges and rights accorded to white persons. These rights and privileges rest upon the equality of all before the law,—the very foundation principle of our government. If the negro must submit to different treatment, to accommodations inferior to those given to the white man, when transported by public carriers, he is deprived of the benefits of this very principle of equality. His contract with a carrier would not secure him the same privileges and the same rights that a like contract made with the same party by his white fellow citizen would bestow. This principle is enforced by the fourteenth amendment to the federal constitution, which declares that no state shall abridge the immunities or privileges of citizens of the

[3] Coger v. Packet Co., 37 Iowa, 145. In this case it was held that a rule of a steamboat company excluding colored passengers from the regular table, and requiring them to take their meals upon the guards of the boat or in the pantry, is not reasonable, and cannot be enforced. The point decided in this case goes no further than to require equal accommodations. In several other cases it has been held that a carrier of passengers has no right to exclude colored persons from its cars. Pleasants v. Railroad Co. (1868) 34 Cal. 586; Turner v. Railroad Co., Id. 594; Derry v. Lowry, 6 Phila. 30.

United States, or deny to any person within its jurisdiction the equal protection of the laws."

In 1875, congress, acting under the powers which it conceived were conferred on it by this amendment, passed what is known as the "Civil Rights Bill," [4] which, in effect, declared that colored citizens, whether formerly slaves or not, should have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens. The constitutionality of this legislation soon came before the federal courts, and was passed on by the federal supreme court in what are known as the "Civil Rights Cases." [5] It was held in these cases that the fourteenth amendment is aimed solely at state action, and not at the action of individuals not sanctioned by state legislation or the authority of the state. "The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual,—an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may be presumably vindicated by resort to the laws of the state for redress. * * * In all these cases, where the constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state, by prohibiting such laws, it is not individual offenses, but abrogation and denials of rights which it denounces, and for which it clothes the congress with power

[4] Act March 1, 1875, §§ 1, 2.

[5] 109 U. S. 3, 3 Sup. Ct. 18.

to provide a remedy. This abrogation and denial of rights for which the states alone were or could be responsible was the great seminal and fundamental wrong which was intended to be remedied." Hence, because this amendment conferred on congress no power to interfere with individual action, the act was held void, as relating to a subject wholly within the purview of state legislation. It was further held that the act could not be sustained under the thirteenth amendment, abolishing slavery, since the refusal to any person of the accommodations of an inn, or a public conveyance, or a place of public amusement, by any individual, and without any sanction or support from any state law or regulation, does not inflict upon such person any manner of servitude or form of slavery, as these terms are understood in this country.[6]

Ever since this decision, and even before it was rendered, it has been held that a common carrier, in the management of its complicated interests, may be authorized in law—on showing a proper or sufficient state of facts to establish, in the opinion of the court, the reasonableness of the rule—in setting apart one or more cars for the use exclusively of colored passengers, and a like number, more or less, as the service may require, for the use exclusively of white passengers; but whenever the company enforces such a rule it is charged with the duty of furnishing colored people, who pay first-class fares, cars that are as safe and comfortable

[6] The validity of this act was repeatedly denied by the inferior federal courts before the question was finally set at rest by the supreme court. Cully v. Railroad Co., 1 Hughes, 536, Fed. Cas. No. 3,466; U. S. v. Washington, 20 Fed. 630; Smoot v. Railway Co., 13 Fed. 337.

in their conditions and appointments as the cars furnished to white passengers who pay first-class fares.[7] Equality of accommodation, it is said, does not mean identity of accommodation; and it is not unreasonable, under certain circumstances, to separate white and colored passengers on a railroad train, if attention is given to the requirement that all paying the same price shall have substantially the same comforts, privileges, and pleasures furnished either class.[8] Thus, it has been held that a colored passenger on a steamboat who refuses to leave the supper table, on objection being made by white passengers, has no right of action against the owner and captain for the latter's act in ordering another table to be set for the other passengers; his supper being served, and he not being obliged to leave his table.[9] But a railroad company which has furnished a separate car for the use of ladies has no right to exclude therefrom a colored woman, and compel her to ride in the gentlemen's car, or in the smoking car, for no other reason except her color.[10]

[7] Houck v. Railway Co., 38 Fed. 226; Britton v. Railway Co., 88 N. C. 536; Chilton v. Railway Co., 114 Mo. 88, 21 S. W. 457; Chesapeake, O. & S. R. Co. v. Wells, 85 Tenn. 613, 4 S. W. 5; Green v. City of Bridgeton, 10 Fed. Cas. 1090.

[8] Logwood v. Railroad Co., 23 Fed. 318; Murphy v. Railroad Co., Id. 637.

[9] McGuinn v. Forbes, 37 Fed. 639.

[10] Chicago & N. W. R. Co. v. Williams, 55 Ill. 185; Gray v. Railroad Co., 11 Fed. 683. Steamboat owners cannot exclude first-class colored passengers from the first-class sleeping cabin set apart exclusively for white passengers, unless the sleeping cabin for colored passengers is as comfortably fitted up and furnished as that for white passengers. The Sue, 22 Fed. 843.

§ 257. SAME—STATUTES REQUIRING SEPARATION.

But quite recently the courts have gone further, and have held that a state statute requiring common carriers, under a penalty, to furnish separate, but equal, accommodations for white and colored passengers, are a valid exercise of the police power of the state, and will be enforced, so long as it is not applied to interstate commerce. Such statutes have been enacted in most, if not all, the former slaveholding states.[1] These statutes have been upheld by the state courts, and have been construed by them as not applying to interstate commerce, but only to passengers traveling wholly within the state.[2] This construction of the statutes is

§ 257. [1] Rev. Code Del. p. 410, § 3; Rev. St. Fla. 1892, § 2268; Acts Ga. 1890–91, vol. 1, No. 751, p. 157; Ky. St. 1894, §§ 795, 796; Ann. Code Miss. 1890, §§ 1276, 3562; Mill. & V. Code Tenn. §§ 2364, 2365; Supp. Sayles' Rev. Civ. St. Tex. art. 4233a; Acts La. 1890, No. 111.

[2] Louisville, N. O. & T. Ry. Co. v. State, 66 Miss. 662, 6 South. 203; Ex parte Plessy, 45 La. Ann. 80, 11 South. 948. Under Gen. St. S. C. § 1494, which requires railroad companies to erect two rooms at passenger stations for the accommodation of passengers, and section 1516, which declares station agents to be conservators of the peace, such agents, without special direction from the company, may publish and enforce a regulation assigning two rooms of equal accommodations to white and colored persons, respectively. Smith v. Chamberlain, 38 S. C. 529, 17 S. E. 371. In Norwood v. Railway Co. (Tex. Civ. App.) 34 S. W. 180, it was held that a colored person cannot recover against a railroad company for putting him in a coach not furnished with the comforts and conveniences provided for the coach for white passengers, as required by statute, unless he has sustained actual damage by reason thereof. In the absence of actual damages, he is not entitled to recover nominal damages. The statute requiring the furnishing of separate coaches provides a penalty to be recovered by the state; and, unless special damages accrue to an individual from its

binding on the federal courts; and, so construed, these statutes cannot be declared invalid, as violating that clause of the federal constitution which gives congress sole power to regulate interstate commerce.[3] Neither do these statutes violate the thirteenth amendment to the constitution, abolishing slavery. "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude."[4] Nor do these statutes violate the fourteenth amendment. "The object of the amendment was undoubtedly to enforce the absolute

violation, the state alone can sue. Id. But a negro passenger may recover for pain suffered by reason of the failure of a railroad company to furnish the car set apart for colored passengers with equal accommodations to those furnished for white passengers. Pain suffered from retention of urine, because of the failure of a railroad company to furnish the car set apart for negro passengers with a water closet, will enable a colored passenger to maintain an action for damages. Henderson v. Railway Co. (Tex. Civ. App.) 38 S. W. 1136. The separate coach law does not give a right of action merely because equal accommodations are not furnished colored passengers, but it must appear that such a passenger has suffered some special damages by reason of the unequal accommodations. Id. A railroad company which has furnished a train with separate car accommodations for colored persons, as required by statute, cannot be convicted criminally for the refusal of third persons, who have chartered it, to permit colored passengers to use the cars intended for them. Louisville & N. R. Co. v. Com. (Ky.) 37 S. W. 79.

[3] Louisville, N. O. & T. Ry. Co. v. Mississippi, 133 U. S. 587, 10 Sup. Ct. 348, affirming 66 Miss. 662, 6 South. 203.

[4] Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, affirming 45 La. Ann. 80, 11 South. 948.

equality of the two races before the law; but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contract, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police powers." "So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes, or even requires, the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures." [5]

[5] Id. The court further said: "We consider the underlying fallacy of plaintiff's argument to consist in the assumption that the enforced

§ 258. SAME—STATUTE REQUIRING EQUAL ACCOMMODATIONS.

In many of the Northern states, and in some of the Southern states, during reconstruction times and shortly after the Civil War, statutes were passed se

separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has more than once been the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals." Mr. Justice Harlan delivered a powerful dissenting opinion in this case. Among other things, he said: "It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by the blacks, as to exclude colored persons from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodations for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection to the statute, therefore, is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or

curing to all persons, irrespective of color, the right to the full and equal enjoyment of the accommodations and privileges of inns, public conveyances, and places

removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' 1 Bl. Comm. 134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each." "State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and the black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting." "The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified by any legal grounds. If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which practically puts the brand of servitude and degradation upon a large class of our fellow citizens,—our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."

of amusement.[1] It was held by the federal supreme court that such a statute is void, so far as it applies to interstate commerce.[2] But such statutes, under the recent decisions above mentioned, would certainly seem to be a valid exercise of the police power of the states, if confined to commerce within the states. It has also been held that an act of congress giving a railroad company the right to construct its road in the District of Columbia, with a proviso that no person should be excluded from the cars on account of color, is binding on the company after it has acted on the grant; and such legislation, enacted in 1863, is not satisfied by setting apart a car for the use of colored passengers, but requires the company to carry them in the same cars in which white passengers are carried.[3]

§ 258. [1] McClain's Code Iowa, §§ 5386, 5387; Laws Minn. 1885, c. 224, § 1 (Gen. St. 1894, § 8002); Comp. St. Neb. 1893, p. 283, c. 14a, § 1; Laws N. Y. 1881, c. 400.

[2] Hall v. De Cuir, 95 U. S. 485, reversing De Cuir v. Benson, 27 La. Ann. 1.

[3] Railroad Co. v. Brown, 17 Wall. 445. Under Act Pa. March 22, 1867 (P. L. 38), which prohibits railroad companies from excluding colored persons from trains, or from setting apart cars for their use, the mere fact that a colored person was excluded from a particular car in the train is not sufficient to sustain a recovery of the penalty provided by the act, but it must appear that the exclusion was on account of race and color. Central R. Co. v. Green, 86 Pa. St. 421. This penalty is given by way of punishment to the offender, rather than by way of compensation to the person aggrieved; and where, therefore, two colored persons, husband and wife, are excluded from a car at the same time and by the same employé, a recovery in right of the wife bars a recovery by the husband, on the principle that penal statutes must be strictly construed. Id. A colored passenger, accompanied by his family, who had purchased tickets on a steamboat entitling him to berths, requested that the berths be exchanged for a

stateroom. On the refusal of the officers to do so, he demanded a return of his passage money, which was refunded, and he voluntarily left the boat. Held, that there was no evidence of discrimination on account of color; that after having sold their berths to plaintiff, and he having secured them, defendant was not bound to rescind the contract, and buy back the berths, and run the risk of selling them over again. Miller v. Steamboat Co., 58 Hun, 424, 12 N. Y. Supp. 301, affirmed 135 N. Y. 612, 32 N. E. 645.

CHAPTER XXI.

FARES.

§ 259. Right to—Reasonableness.
260. State Regulation.
261. Same—Of Street-Railway Fares by City.
262. Same—Interstate Commerce Act.
263. Same—Penalty for Excessive Fare.
264. Same—Free Passes to Public Officers.
265. Same—Sale of Tickets by Scalpers.
266. Mode of Payment.
267. Time of Payment.
268. Higher Train Fare.
269. Same—Reasonable Opportunity to Purchase Ticket.
270. Same—Excessive or Unreasonable Train Fare.
271. On Freight Trains.
272. Free Pass—Contract for.
273. Remedies of Carrier for Nonpayment.
274. Recovery Back by Passenger.

§ 259. RIGHT TO—REASONABLENESS.

At common law, a common carrier has the right to charge a reasonable compensation for the transportation of passengers and property, but he must not unjustly discriminate against any person or place.

As a matter of course, a common carrier is entitled to compensation for his services in transporting either property or persons. In cases of corporations, no express grant of power is necessary to confer the right to charge and collect compensation for such services, but such right is implied from the authority to engage in

the business of carrying.[1] The only limitation, at common law, on the carrier's power to make charges, is that they must be reasonable,[2] and that he must not unjustly discriminate against particular persons and localities.[3]

§ 260. STATE REGULATION.

A state legislature has the power to fix rates for the transportation of passengers and property by railways, in the absence of a charter constituting a contract with the corporation, pro-

§ 259. [1] Boyle v. Railroad Co., 54 Pa. St. 310; Pennsylvania R. Co. v. Sly, 65 Pa. St. 205, 211.

[2] In Interstate Commerce Commission v. Railroad Co., 145 U. S. 263, 12 Sup. Ct. 844, it was said that, prior to the enactment of the interstate commerce act, "railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded but little more than that they should carry for all persons who applied, in the order in which goods were delivered at a particular station, and that charges should be reasonable."

[3] In Atwater v. Railroad Co., 48 N. J. Law, 55, 2 Atl. 803, it was said: "At this day it would be superfluous to enter upon a discussion to support the doctrine, so well settled, that common carriers are public agents transacting their business under an obligation to observe equality towards every member of the community, to serve all alike, without giving any unjust or unreasonable advantages by way of facilities for the carriage or rates for transporting them." In this case it was held that a railroad company, chartered as a carrier of passengers and freight, is under no obligation to establish commutation rates for a particular locality; but when it has established such rates, and commutation tickets are sold thereat to the public, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him, and a violation of the principle of equality which the company is bound to observe in the conduct of its business.

vided that what is done does not amount to a regulation of foreign or interstate commerce; and the extent of judicial interference is protection against unreasonable rates.

In Munn v. Illinois,[1] the supreme court of the United States laid down this broad principle: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." It was accordingly held that the legislature of Illinois had the power to regulate the charges for the storage of grain in the elevators and warehouses in that state. In Chicago, B. & Q. R. Co. v. Iowa,[2] decided at the same time, it was further held that railroad companies, being engaged as common carriers in a public employment affecting the common interest, are subject to legislative control as to their rates of fare and freight, unless protected by their charters. Since these decisions have been rendered, it has become the settled law of this country that the legislature of a state has power to

§ 260. 1 94 U. S. 113. In this case it is said that in England the charges of common carriers have been regulated by statute since the reign of William and Mary.

2 94 U. S. 155.

prescribe the charges of a railroad company for the carriage of passengers and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without compensation, and that what is done does not amount to a regulation of foreign or interstate commerce.[3] In most, if not all, the states, a constitutional provision at present exists reserving to the state the power to alter, repeal, or amend charters of corporations, or the laws under which they are organized. Under such a constitutional reservation, the legislature has the power to regulate the charges for the carriage of passengers, without impairing the obligation of any contract, provided the regulations are not so unreasonable as to work injustice to the corporation.[4] In many of the states, laws have ac-

[3] Georgia Railroad & Banking Co. v. Smith, 128 U. S. 274, 9 Sup. Ct. 47; Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400; Storrs v. Railroad Co., 29 Fla. 617, 11 South. 226. A statute requiring railroads operating in this state to issue, at a certain rate, mileage books entitling the holder to "travel one thousand miles on the lines of such railroad," is intended to make such mileage books good only for passage between points in the state, and therefore does not, as regards railroads extending beyond the state, interfere with interstate commerce. Beardsley v. Railroad Co., 15 App. Div. 251, 44 N. Y. Supp. 175, affirming 40 N. Y. Supp. 1077; Dillon v. Railroad Co., 19 Misc. Rep. 116, 43 N. Y. Supp. 320.

[4] St. Louis & S. F. Ry. Co. v. Gill, 54 Ark. 101, 15 S. W. 18; St. Louis & S. F. Ry. Co. v. Ryan, 56 Ark. 245, 19 S. W. 839. See, also, Hinckley v. Railway Co., 38 Wis. 194; Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 425. In the absence of such a reservation of

cordingly been passed fixing the maximum rate of fare for passengers at a certain sum per mile.[5] In others, railroad commissions have been created, with power to fix a schedule of rates. It has been held that the conferring of this authority on the commission is not void as a delegation of legislative or judicial powers to a body not authorized to exercise them.[6] So, congress has power, in the case of railroad companies which

power, however, the charter of a railroad company is a contract between the state and the company; and the regulation by the legislature of charges for freight and passengers impairs the obligation of that contract, within the meaning of the federal constitution, and is void. Philadelphia, W. & B. R. Co. v. Bowers, 4 Houst. (Del.) 506.

[5] Between two and three cents per mile, according to the gross earnings of each company, 1 How. Ann. St. Mich. § 3323, subd. 9. Three cents per mile, Pub. Gen. Laws Md. art. 23, p. 353, § 170; Comp. St. Neb. 1893, c. 72, art. 9, §§ 1, 2; Rev. St. Ohio 1890, § 3374; Sayles' Civ. St. Tex. art. 4258b, § 9. Three and one-half cents, McClain's Code Iowa 1888, § 2000. Between three and four cents per mile, according to classification of roads, Rev. St. Mo. 1889, § 2673. Six cents, Comp. Laws N. M. 1884, § 2721. Gen. St. Conn. 1888, § 3526, requires railroad companies to charge for Sunday travel the highest regular fare charged on week days, and prohibits commutation tickets on that day. Under Act Ohio March 30, 1875, which limits the maximum fare for passengers on railroad trains to three cents per mile, "for a distance of more than eight miles, provided the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance," a railroad company has the right to charge at least 25 cents for any distance greater than eight miles; and for a distance less than eight miles any reasonable sum not exceeding 25 cents may be charged. Railroad Co. v. Skillman, 39 Ohio St. 444. Rev. Civ. Code La. 1889, art. 2753, provides: "The price of passage agreed to be paid by a woman for going by sea from one country to another shall not be increased in case the woman has a child during the voyage, whether her pregnancy was known or not by the master of the ship."

[6] Storrs v. Railroad Co., 29 Fla. 617, 11 South. 226.

have received land grants from the federal government, to fix the rates for transporting soldiers of the regular army at one-half the amount charged by the company for its usual passengers, in the absence of the violation of any vested rights, or of any showing that the rate fixed by congress is unreasonable.[7]

On the question whether the rates, as fixed by the commission, are reasonable, the courts cannot interfere to substitute their judgment for that of the commissioners, when there is room for a difference of intelligent opinion on the question whether the rates will prove remunerative to the company; but the tariffs, as fixed by the commissioners, must, in so far as the courts are concerned, be left to the test of experiment. If the test of such experiment, however, demonstrates that the rates fixed by the commissioners do not pay the operating expenses of the road, an abuse of discretion is shown, and such rates will be held invalid, as a taking of the railroad company's property without just compensation.[8]

In some of the states there is a provision against un-

[7] Atlantic & P. R. Co. v. U. S., 76 Fed. 186.

[8] Pensacola & A. R. Co. v. State, 25 Fla. 319, 5 South. 833. In Ohio it has been held that the question whether a rate is reasonable is for the jury, and not the court, whenever the hearing of testimony is necessary to determine the question. Smith v. Railway Co., 23 Ohio St. 10. Whether or not Act Mich. June 28, 1889, § 9 (Pub. Laws 1889, pp. 282, 283), fixing a maximum two-cent rate of fare for passenger travel on railroads, the gross earnings of whose passenger trains exceeded $3,000 per mile for the preceding year, is unreasonable, will not be determined in a friendly suit, where it does not appear in what the operating expenses of the road consist. Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400.

reasonable discrimination in the transportation of passengers and freight.[9] Under such a statute,[10] it has been held that the fact that certain students are permitted to purchase season tickets at half-fare rates does not constitute an unjust discrimination against another student, similarly situated with the favored students, who has paid full fare for his season ticket; and he cannot recover the excess from the company.[11]

§ 261. SAME—OF STREET-RAILWAY FARES BY CITY.

Since street-railway companies are permitted to use the public streets, and along their tracks have a right of way on which they are entitled to preference over other vehicles passing along the streets, it necessarily follows that the general regulation and control of such railways are under the police powers in the city government, and the municipality may enact all reasonable rules for that purpose.[1] Hence, also, the legislature has power to regulate its rates of fare, and it

[9] Mills' Ann. St. Colo. p. 352, § 496; Const. Ky. § 196 (St. 1891, p. 138). 1 How. Ann. St. Mich. § 3416, authorizes railroad companies to make contracts for the conveyance of passengers on designated trains, for a specific distance, at fixed times, at reduced rates. Such tickets shall not entitle the holder to ride on any train not therein designated, or at any time beyond that stipulated therein.

[10] St. Mass. 1874–75, p. 391, c. 372, § 138, which requires railroad companies to carry all persons on "reasonable and equal terms."

[11] Spofford v. Railroad, 128 Mass. 326.

§ 261. [1] Sternberg v. State, 36 Neb. 307, 54 N. W. 553; South Covington & C. St. Ry. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026; State v. Inhabitants of Trenton, 53 N. J. Law, 178, 20 Atl. 1076; St. Louis v. Railroad Co., 89 Mo. 44, 1 S. W. 305.

may confer such power upon municipalities.[2] Generally, the power to regulate these companies is expressly reserved by the cities in grants to them of the right to use the streets. Under a reservation of power to fix fares, the city may require tickets, 6 for 25 cents, to be kept for sale by each conductor of a street car.[3] But an ordinance limiting the fare of street railways to five cents does not require a company to carry to his destination, for a single fare, a passenger who boards a car which goes only part of the way, and then diverges, but it may charge him another fare when he enters the connecting car, though, if he had taken that car in the first instance, he could have gone through for one fare.[4] So, an ordinance granting a franchise to a street-railway company, authorizing it to charge persons residing in a distant section of the city double the fare it may charge persons residing in other portions, is not invalid, as an unreasonable discrimination in favor of common carriers; and a passenger residing in the prohibited district may be expelled for refusal to pay the double fare.[5]

[2] Dean v. Railway Co., 64 Ill. App. 165.

[3] Sternberg v. State, 36 Neb. 307, 54 N. W. 553. In this case it was said: "A street railway has no depots. Its stopping places are on each street corner, and it transacts its business with the public in its cars, and its tickets should be kept on sale where it transacts its business with the public."

[4] Ellis v. Railroad Co., 67 Wis. 135, 30 N. W. 218.

[5] Robira v. Railroad Co., 45 La. Ann. 1368, 14 South. 214; Forman v. Railroad Co., 40 La. Ann. 446, 4 South. 246; De Lucas v. Railroad Co., 38 La. Ann. 930.

§ 262. SAME—INTERSTATE COMMERCE ACT.

On February 4, 1887, congress, under the power conferred on it by the commerce clause of the federal constitution, empowering it to regulate commerce with foreign nations, and among the several states, passed what is known as the "Interstate Commerce Act." [1]

§ 262. [1] 24 Stat. 379. The provisions of this act, so far as applicable to carriers of passengers, are as follows:

"Section 1. * * * All charges for any service rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared unlawful.

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited, and declared to be unlawful.

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and con-

This act, among other things, requires all charges made for any services rendered or to be rendered by railroad companies in the transportation of persons and property to be reasonable and just; prohibits unjust discrimination, which is defined to be charging one person more than another for similar services in the transportation of persons and property; prohibits greater charges for hauling a shorter than for a longer distance over the same line in the same direction; and creates a commission for the enforcement of its various provisions. Section 22, however, permits indigent persons, ministers of the gospel, and railroad officials or employés to be transported free of charge.

The supreme court of the United States has said that the principal objects of the interstate commerce act were to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services, under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a

ditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance. * * *"

"Sec. 22. Nothing in this act shall apply * * * to the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employés, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employés."

longer distance over the same line; and to abolish combinations for the pooling of freight. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railroad companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons traveling over the same road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than he can at retail. In order to constitute an unjust discrimination, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but in either case it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances or conditions." [2] Hence it was held that a railroad company may issue and sell a party-rate ticket, good for ten or more persons, at a lower price per capita than a single ticket for a single passenger.[3] So, the provision against unjust discrimination is not violated by a sale of "limited" first-class tickets for a less fare than "unlimited" first-class tickets; the difference being that the holder of an unlimited first-class ticket is entitled to stop-over privileges, while the holder of a limited ticket must make a continuous journey.[4] But un-

[2] Interstate Commerce Commission v. Railroad Co., 145 U. S. 263, 12 Sup. Ct. 844, affirming 43 Fed. 37.

[3] Id.

[4] U. S. v. Egan, 47 Fed. 112.

der this act a railroad company has no right to issue passes, or carry any person free of charge, so long as the same privilege is denied to any other person "under substantially similar circumstances or conditions"; and section 22 of the act, which permits the free carriage of employés of a railroad, by necessary implication forbids the free transportation of the families of employés.[5] The act, however, does not prohibit the issuance of railway passes upon a moneyed or other valuable consideration, but only prohibits free transportation.[6]

§ 263. SAME—PENALTY FOR EXCESSIVE FARE.

A statute giving a penalty to the party aggrieved by a railroad company's charge of fare in excess of the maximum prescribed by law is not in contravention of the constitution.[1] But, under such a statute,[2] only one penalty, together with the excess of fare, can be recovered for all acts committed prior to the commencement of the action. The penalty is not given as a satisfaction for the injury received. That is fully satisfied by a return of the sum extorted, with interest.

[5] Ex parte Koehler, 31 Fed. 315. The act is violated where a railroad official, as a matter of personal favor, issues a free pass for transportation from one state to another to a person not within the exception of section 22 of the act (24 Stat. 387); i. e. indigent persons, ministers of the gospel, or railroad officials and employés. In re Charge to Grand Jury, 66 Fed. 146.

[6] Curry v. Railway Co. (Kan. Sup.) 48 Pac. 579.

§ 263. [1] Cincinnati, S. & C. R. Co. v. Cook, 37 Ohio St. 265, upholding Act Ohio April 20, 1874 (71 Ohio Laws, p. 146).

[2] Laws N. Y. 1857, c. 185, which provides for a penalty of $50 in favor of a passenger who has been overcharged by a railroad.

But it is given to compensate the party injured for his expenses in the prosecution, and to compel the payment of such a sum by the company violating the law as will effectually stop the practice.[3] The fact that plaintiff took passage simply for the purpose of being charged the excessive fare, and of bringing an action for the penalty, does not defeat his right to it.[4] Nor is it any defense to an action for such a penalty that the overcharge was made through a mistake as to the distance between stations on defendant's road between which plaintiff traveled. It is the company's duty to know the distance between the stations on its road.[5] But an honest mistake by the conductor in making change for a passenger, without an intention of taking an amount greater than is lawful, does not subject the company to the statutory penalty for an overcharge of fare.[6] A champertous agreement between plaintiff and his attorney in an action to recover a statutory penalty for charging an excessive fare is not a cause for abating the action.[7] The New York statute to pre-

[3] Fisher v. Railroad Co., 46 N. Y. 644.

[4] Fisher v. Railroad Co., 46 N. Y. 644; Railway Co. v. Smith, 60 Ark. 221, 29 S. W. 752; Railway Co. v. Gill, 54 Ark. 101, 15 S. W. 18. But the penalty for refusal to give a transfer to "any passenger desiring to make one continuous trip" between any two points on a street-railroad system cannot be recovered by one who demanded a transfer with the sole object of recovering for a refusal. He did not desire to make a continuous trip between two points on the connecting lines. His whole purpose was not to be transferred at the point where he made his demand. Myers v. Railroad Co., 10 App. Div. 335, 41 N. Y. Supp. 798.

[5] Railway Co. v. Smith, 60 Ark. 221, 29 S. W. 752.

[6] Railway Co. v. Clark, 58 Ark. 190, 25 S. W. 504.

[7] Railway Co. v. Smith, 60 Ark. 221, 29 S. W. 752. Judgment for the

vent extortion by railroad companies does not apply to street railroads, whose fare for the transportation of passengers is fixed or regulated by contract with the city authorities bestowing the grant.[8]

statutory penalty for an alleged overcharge of fare is not a bar to an action by the passenger for his wrongful ejection from the train because of his refusal to pay the alleged overcharge. St. Louis & S. F. Ry. Co. v. Trimble, 54 Ark. 354, 15 S. W. 899.

[8] Moneypenny v. Railroad Co., 7 Rob. (N. Y.) 328; Hoyt v. Railroad Co., 1 Daly (N. Y.) 528. The New York general railroad act of 1850, which confers on existing railroad companies all powers and privileges conferred on railroad companies to be organized under it, enables railroads theretofore created by special charter to charge a fare of three cents per mile,—the fare prescribed by the general law,—though the charter limits it to a smaller sum. Johnson v. Railroad Co., 49 N. Y. 455, reversing 2 Sweeney (N. Y.) 298. Where a domestic company organized under Laws N. Y. 1866, c. 763, as amended by Laws N. Y. 1869, c. 722, which does not prescribe any limit as to fares, is operated by a foreign corporation under a lease, it must appear that the domestic corporation was afterwards organized under the general railroad act of 1850, and its amendments, prescribing the rate of fare, before the lessor is liable for the penalty prescribed by that act for extortion. Palm v. Railroad Co., 58 N. Y. Super. Ct. 502, 12 N. Y. Supp. 554. On motion to set aside the service of a summons on the ground that the action is for a penalty given by statute, and that a copy of the complaint was not delivered to defendant with the copy of the summons served, as required by Code Civ. Proc. N. Y. § 1897, an averment on information and belief in the moving affidavits as to the nature of the action is insufficient, without stating the source of information or the grounds of belief. Delisser v. Railroad Co., 20 Civ. Proc. R. 312, 14 N. Y. Supp. 382. Laws N. Y. 1857, c. 185, which provides that a passenger charged an excessive fare may recover a penalty of $50, gives a right of action only to the person aggrieved, and not to a common informer; and hence the summons need not be served by the sheriff, as required by Code Civ. Proc. § 1895, in actions by common informers for penalties. Quade v. Railroad Co., 59 N. Y. Super. Ct. 479, 14 N. Y. Supp. 875. In such action, an objection that the summons was not served by the proper person can only be made

§ 264. SAME—FREE PASSES TO PUBLIC OFFICERS.

Quite recently the issuance of free passes to public officers has been forbidden by statutory or constitutional provisions in various states.[1] It has been held that even a notary public is a public officer, within the meaning of a constitutional inhibition against the transportation of any "public officer" on a free pass; and, though he rightfully received the free pass before the constitution went into effect, yet he is prohibited from thereafter using it while he continues to hold the office.[2] But the railroad commissioners, in the discharge of their official duties, may travel on passes signed by the secretary of state, requiring railroad

on motion to set aside the service, and is waived by answering. Ahner v. Railroad Co., 20 Civ. Proc. R. 318, 14 N. Y. Supp. 365. But in Burke v. Railroad Co., 15 N. Y. Supp. 148, it was held that an allegation in the answer that the summons was not properly served must be specifically pleaded as a defense, and must be separately stated and numbered. Under the United States internal revenue act of 1864 (13 Stat. 286), which imposed a tax of 2½ per cent. on the gross receipts of railroad companies, and authorized them to add it to their rates of fare, a street-railway company, limited to a five-cent fare by its charter, cannot charge a six-cent fare, since the proportional amount of the tax on each passenger is only a fraction of a cent. Black v. Railroad Co., 1 Daly (N. Y.) 536.

§ 264. [1] Rev. St. Fla. 1892, § 2689; Const. Ky. § 197 (Gen. St. 1891 p. 138); Rev. St. Mo. 1889, §§ 3863, 3864; Const. N. Y. 1895, art. 13, § 5. Rev. St. Fla. 1892, § 2691, also prohibits the issuance of such passes to delegates to political conventions. Ann. Code Miss. § 1230, makes it a misdemeanor for any public official to travel on railroads without paying full fare. Pub. St. N. H. 1891, p. 452, §§ 5-7, prohibit the issuance of free passes except to railroad officials and poor persons.

[2] People v. Rathbone, 145 N. Y. 434, 40 N. E. 395.

companies to carry them without charge, as provided by statute.[3]

But a public officer traveling on a free pass issued by a street-railroad company is estopped, in an action for injuries caused by the negligence of the company, from setting up that the pass was void under the constitution, prohibiting the issuance of free passes to public officers, and that the conditions attached to its acceptance and use were consequently inoperative.[4]

§ 265. SAME—SALE OF TICKETS BY SCALPERS.

If a business, as that of common carrier, is a proper subject of police regulation, so are its incidents and accessories; as, for example, the issue and sale of transportation tickets.[1] A statute which requires railroad companies to issue tickets only through authorized agents appointed in a particular manner, and which prohibits the transfer of tickets by purchasers who fail to use them, but requires their redemption by the railroad, is not unconstitutional, as depriving the purchaser of his property without due process of law. The ticket is not destroyed or taken from the holder, nor is his right to ride on it at all limited. The only limitation is on his right to transfer it. A man has no constitutional right to insist that these contracts for transportation shall be transferable. Neither is such a statute unconstitutional as "class legislation," grant-

[3] Laws N. Y. 1882, c. 353; In re Board of Railroad Com'rs, 11 Misc. Rep. 103, 32 N. Y. Supp. 1115.

[4] Muldoon v. Railway Co., 10 Wash. 311, 38 Pac. 995.

§ 265. [1] State v. Corbett, 57 Minn. 345, 59 N. W. 317.

ing special privileges to carriers, nor as a delegation of the police power of the state to grant licenses to engage in business, or as an interference with interstate commerce.[2]

But a sale of a railroad ticket by a scalper, if valid in the state where made, is valid everywhere; and the railroad company cannot refuse to carry a passenger on this ground after he comes into a state where the sale of tickets by scalpers is prohibited.[3]

In case of a lawful sale of a ticket by a broker, he does not from the sale alone undertake for anything beyond the genuineness of the ticket; and therefore the broker is not liable to the purchaser for the carrier's refusal to transport him on any ground other than the genuineness of the ticket.[4]

§ 266. MODE OF PAYMENT.

Fare must, of course, be paid in legal-tender money. Suppose, however, that a depreciation in a certain kind of money takes place; must a railroad company, whose rates of fare are fixed by statute, accept the depreciated currency at its face value, or may it exact payment in the kind of money, or its equivalent, current at the time its rates were fixed? In view of the movement in this country for the free coinage of silver at less than its commercial value, this question may cease to be one of purely speculative interest in the near

[2] State v. Corbett, 57 Minn. 345, 59 N. W. 317, construing Laws Minn. 1893, c. 66. See, also, Fry v. State, 63 Ind. 552; Burdick v. People, 149 Ill. 600, 36 N. E. 948.

[3] Sleeper v. Railroad Co., 100 Pa. St. 259.

[4] Elston v. Fieldman, 57 Minn. 70, 58 N. W. 830.

future. Only two decisions touching this question seem to have been reported. Both are by inferior courts in New York, and they are squarely in conflict. In Moneypenny v. Railroad Co.[1] it was held that if a city railroad company secures a charter allowing it to receive a five-cent fare for each passenger at a time when specie is the lawful currency, and subsequently the general government issues a paper currency, which enhances the value of the original fare, the company will be justified in enhancing the fare to six cents, if paid in paper. But in Lewis v. Railroad Co.[2] it was held that a railroad company is bound to accept United States notes, issued in pursuance of the legal-tender acts of congress, at the value expressed on the face of them, in payment of fare upon its road; and if it exacts payment of the legal fare from a passenger, in advance, in gold or silver coin of the United States, it will be guilty of extortion, and liable to the penalty imposed by statute for asking and receiving a greater rate of fare than allowed by law. The probabilities are that the courts, especially if reconstructed by the party in favor of the free coinage of silver at less than its commercial value, would ultimately hold that railroad companies are bound to accept all legal-tender money at its face value.

A railroad company is under no obligation to transport a passenger who has innocently purchased his ticket with counterfeit money, and may eject him from the train if he refuses to rectify the wrong.[3] But so

§ 266. [1] 7 Rob. (N. Y.) 328.

[2] 49 Barb. (N. Y.) 330.

[3] Memphis & C. R. Co. v. Chastine, 54 Miss. 503.

long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for car fare to the extent of its original value; and, if ejected for refusal to make any other payment, the passenger may have an action for damages.[4] It is the duty of a ticket agent to exercise reasonable care in delivering a ticket to the purchaser; and if the purchaser, after applying for his ticket, and putting down money to pay for it, is called away, it is no delivery to put the ticket on the counter in his absence, if it did not in fact come into his possession.[5]

A passenger on a street car need not tender the exact fare, but he must tender a reasonable sum, and the carrier must accept such tender, and must furnish change to a reasonable amount. The supreme court of California has held that the tender of a five-dollar gold piece in payment of a five-cent fare is a reasonable tender.[6] But the New York court of appeals has recently

[4] Jersey City & B. R. Co. v. Morgan, 52 N. J. Law, 60, 18 Atl. 901. So, a genuine silver coin of the United States, distinguishable as such, though somewhat rare, and differing in appearance from other coins of this government, of like denomination and of later date, is nevertheless a legal tender for car fare; and a passenger ejected for refusal to make payment otherwise than by tendering such a coin is entitled to an action for damages. That a conductor declined to receive a coin of this character, because he in good faith believed it was a counterfeit, will not relieve the railroad company from liability. Atlanta Consol. St. Ry. Co. v. Keeny (Ga.) 25 S. E. 629.

[5] Quigley v. Railroad Co., 5 Sawy. 107, Fed. Cas. No. 11,510.

[6] Barrett v. Railway Co., 81 Cal. 296, 22 Pac. 859. The tender of a five-dollar gold piece in payment of a five-cent fare by a passenger on

held that a rule of a street-railroad company requiring the conductor to furnish change to passengers to the amount of two dollars is reasonable as matter of law, that the tender of a five-dollar bill in payment of a five-cent fare is not a valid tender, and that a passenger who declines to pay fare except with such a bill may be ejected, though he was ignorant of the rule.[7]

A passenger on a street car, who, by mistake, places in the fare box more money than is necessary to pay his fare, is entitled to have the error corrected in the car; and a rule of the company requiring him to make his claim at the office of the company is unreasonable. Where another passenger hands her fare to him, it is entirely reasonable for him to retain it for the purpose of reimbursing himself.[8] So, where a conductor, by mistake in making change, returns to a passenger too much money, and afterwards informs the passenger of the mistake, and the passenger declines to correct it,

a street car is not a refusal to pay fare, within Civ. Code Cal. § 2188, authorizing the ejection of passengers who refuse to pay fare. Id. But the tender, to a conductor on a train, of a $20 gold piece in payment of a $1.35 fare, is not a reasonable tender. Fulton v. Railway Co., 17 U. C. Q. B. 428.

[7] Barker v. Railroad Co., 151 N. Y. 237, 45 N. E. 550. The court said: "When the defendant enacted the rule requiring its conductors to furnish change to a passenger to the amount of two dollars, it did all that could reasonably be expected of it in consulting the convenience of the general public, and it would be unreasonable and burdensome to extend the amount to five dollars. It would require conductors to carry a large amount of bills and small change on their persons, and greatly impede the rapid collection of fares."

[8] Corbett v. Railway Co., 42 Hun, 587; s. c. 114 N. Y. 579, 21 N. E. 1033.

the conductor may expel him from the train at a point to which the money received actually pays the fare."

§ 267. TIME OF PAYMENT.

A common carrier of passengers may demand payment of fare either at the beginning of the journey or at any subsequent time.[1] On street railroads, the general custom is for the passenger to pay his fare in the car on demand, without purchasing a ticket; but on ordinary railroads the general custom is for the passenger to pay fare by the purchase of a ticket before the journey begins, though payment of fare to the conductor of the train, on demand, is also practiced. But it has been held that a railroad company has the right to make and enforce a rule requiring passengers at a crowded depot, where trains are constantly arriving and departing for different points and directions, to purchase tickets, and to exhibit them to the gateman or other employé before boarding the train.[2]

[a] McCarthy v. Railroad Co., 41 Iowa, 432.

§ 267. [1] This is the provision of Civ. Code Cal. § 2187; Comp. Laws Dak. 1887, § 3896; Civ. Code Mont. 1895, § 2897. Comp. Laws N. M. 1884, § 2682, authorizes railroad companies to demand the payment of fare in advance, and gives a lien on the passenger's luggage to secure the payment.

[2] Pittsburgh, C. & St. L. R. Co. v. Vandyne, 57 Ind. 576; Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052; Northern Cent. Ry. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449; Dickerman v. Depot Co., 44 Minn. 433, 46 N. W. 907. In this last case it was further held that the servants of the railroad company have the right to seize and detain a passenger so far as necessary to prevent him from boarding a train in motion. Where a railroad company advertises to carry passengers from several points to another, and return, "for one half fare for the round trip," passengers desiring to avail themselves thereof

§ 268. HIGHER TRAIN FARE.

In the absence of statutory prohibition, a railroad company may charge a higher price for carrying passengers when the fare is paid on the train than it does at its ticket office, provided reasonable facilities are afforded passengers for purchasing tickets, and provided the train fare is not unreasonable, and does not exceed the maximum allowed by law.[1] "Such a regulation has been very generally considered beneficial both to the public and the corporation, if carried out in good faith. It imposes no hardship or injustice on

are chargeable with notice that, when a round trip at one fare is advertised, it necessarily implies the purchase of a special ticket. But when the company has none on sale at a station, and a passenger gets on and is carried one way for half fare by the conductor, who understands the circumstances, he should call at the company's office at destination for a return-trip ticket; and if he fails to do so, and tenders the conductor on the return trip only half a fare, without any explanation, the conductor is justified in ejecting him. St. Louis & C. R. Co. v. Carroll, 13 Ill. App. 585.

§ 268. [1] Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460; Toledo, W. & W. Ry. Co. v. Wright, 68 Ind. 586, 595; Evansville & I. R. Co. v. Gilmore, 1 Ind. App. 468, 27 N. E. 992; Lake Erie & W. R. Co. v. Mays, 4 Ind. App. 413, 30 N. E. 1106; State v. Chovin, 7 Iowa, 204; Wilsey v. Railroad Co., 83 Ky. 511; Swan v. Railroad, 132 Mass. 116; Du Laurans v. Railroad Co., 15 Minn. 49 (Gil. 29); Bordeaux v. Railway Co., 8 Hun, 579; Railroad Co. v. Skillman, 30 Ohio St. 444. The right to charge an extra fare on trains is given by statute in some of the states. Civ. Code Cal. § 2189; Gen. St. Kan. 1889, par. 1325. See, also, next section. By the law of South Carolina, where a passenger is offered an opportunity, by the railroad on which he proposes to travel, to purchase a ticket, and then neglects or refuses to do so, the railroad fare of such passenger is the ordinary ticket fare and 25 cents additional. Moore v. Railroad Co., 38 S. C. 1, 16 S. E. 781.

passengers, who may, if they desire to do so, pay their fare and procure tickets at the lower rate before entering the cars; and it tends to protect the corporation from the frauds, mistakes, and inconveniences incident to collecting fares and making change on trains while in motion, and from imposition by those who may attempt to ride from one station to another without payment, and to enable conductors to attend to the various details of their duties on the train and at stations." [2]

If a passenger on a train, without a ticket, pays only from station to station, he may be compelled to pay the higher train fare on each payment, since a new contract between the company and the passenger is made at each station.[3]

Such a regulation is not waived by the fact that passengers have been allowed to ride for the ticket fare paid on the train.[4] Nor does the acceptance by the conductor of less than the regular train fare amount to a contract to carry to destination, where the conductor immediately demands the full fare; and the passenger

[2] Forsee v. Railroad Co., 63 Miss. 66. See, also, to same effect, State v. Goold, 53 Me. 279; Hilliard v. Goold, 34 N. H. 230. But the court cannot assume that a railroad company makes a distinction between ticket fare and train fare, but this fact must be pleaded and proved. Avey v. Railroad Co., 11 Kan. 148.

[3] Chicago, R. & Q. R. Co. v. Parks, 18 Ill. 460.

[4] Sage v. Railroad Co., 134 Ind. 100, 33 N. E. 771. But, in an action for ejecting a passenger who refused to pay the higher train fare, evidence of the custom of the road not to make any discrimination between ticket and train fare is admissible to show that plaintiff was acting in good faith, especially where the company does not prove any rule fixing a higher rate on trains. Louisville, N. & G. S. R. Co. v. Guinan, 11 Lea (Tenn.) 98.

may be expelled at a point beyond which the fare paid does not entitle him to ride.[5]

A regulation of a railroad company requiring the difference between the ticket fare and the train fare to be refunded to the passenger on presentation, at a ticket office, of a check issued to him by the conductor on collecting the excess on the train, is also valid. Since the company may refuse to carry at all without a ticket, it may fairly refuse under the far less inconvenient alternative to the traveler of putting him to the trouble of going to a ticket office to get his excess refunded. "If the company may charge those failing to get a ticket an additional price and keep it, certainly they may charge such price and refund it." [6]

§ 269. SAME—REASONABLE OPPORTUNITY TO PURCHASE TICKET.

It has been held in a few cases that, to enable a railroad company to charge a higher fare on trains than at the station, it need not keep its ticket office open a reasonable time before the departure of the train, provided the train fare is a reasonable one. The regulation permitting the lower charge at the station than on the train is a mere proposal, which is withdrawn by the closing of the ticket office and the withdrawal of the agent.[1] But, by the overwhelming weight

[5] Lake Erie & W. R. Co. v. Mays, 4 Ind. App. 413, 30 N. E. 1106.

[6] Reese v. Railroad Co., 131 Pa. St. 422, 434, 19 Atl. 72. The excess is required to be refunded in this manner by statute in some states. Comp. St. Neb. 1893, p. 642, c. 72, art. 9, § 3; Revision N. J. p. 944, § 164; Pub. St. R. I. p. 409, c. 158, § 31.

§ 269. [1] Crocker v. Railroad Co., 24 Conn. 249; Bordeaux v. Railway Co., 8 Hun, 579.

of authority, the furnishing of proper facilities to enable a passenger to purchase a ticket is a prerequisite to the right to demand a train fare at a higher rate than the ticket fare; and, if such facilities are not furnished, a passenger who, without fault on his part, boards the train without such a ticket, will, on tender of the ticket fare, be entitled to all the rights and privileges that a ticket would afford him.[2] If a passenger has not been afforded a reasonable opportunity to purchase a ticket at the station where the journey began, he is not bound to leave the train at a station en route, and purchase a ticket back to the station whence he started, and another to his destination. If he is rightfully on the train without a ticket, it is his right to complete his journey by paying the ticket rate for his fare.[3] So, a carrier

[2] Cleveland, C., C. & St. L. Ry. Co. v. Beckett, 11 Ind. App. 547, 39 N. E. 429; Jeffersonville R. Co. v. Rogers, 28 Ind. 1; St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 352; Forsee v. Railroad Co., 63 Miss. 93; Georgia South. & F. R. Co. v. Asmore, 88 Ga. 529, 15 S. E. 13.

[3] Central Railroad & Banking Co. v. Strickland, 90 Ga. 562, 16 S. E. 352. A passenger boarded a train at a flag station, and there was a dispute between him and the conductor as to the proper rate to be charged. The conductor finally informed him that he could ride at four cents a mile to the next station, where tickets were sold, and could get off the train there, buy a ticket, and resume his journey the rest of the way for three cents a mile. The passenger agreed to this, and paid the four cents a mile to the next station, got off the train for the purpose of procuring a ticket, but could not do so, because the ticket office was closed. He then boarded the train again to continue his journey, and tendered the conductor three cents a mile. Held, that the conductor had no legal right to put him off the train because he refused to pay four cents a mile, though the conductor had instructions to charge four cents a mile train fare. The passenger is not presumed to know the private or secret rules given by the company to its conductors, but has a right to rely upon their statements

which advertises that it will carry passengers on a special train at excursion rates from a certain station at which it has no ticket office or agent cannot insist that all who board the train shall first purchase an excursion ticket; and it has no right to eject a passenger who tenders, on the train, the excursion rate.[4] So, it has been held that the fact that the company agrees to refund the excess train fare on presentation of the conductor's receipt or check at any regular station does not authorize the higher train charge, if no reasonable opportunity is given the passenger to purchase a ticket in the first instance.[5] "It cannot be justly said that it is

as to what the rules are in contracting with them. Georgia Railroad & Banking Co. v. Murden, 86 Ga. 434, 12 S. E. 630.

[4] Chicago, St. L. & P. R. Co. v. Graham, 3 Ind. App. 28, 29 N. E. 170.

[5] Phettiplace v. Railroad Co., 84 Wis. 412, 54 N. W. 1092; Poole v. Railroad Co., 16 Or. 261, 19 Pac. 107. But in Harrison v. Fink, 42 Fed. 787, it was held that a passenger who is unable to procure a ticket at a station because the agent has gone out to meet the train at the water tank, 200 feet away, and who refuses to pay the extra train fare, and take a rebate check for the excess, as required by the company's rules, sanctioned by the state railroad commission, may be ejected from the train. In Snellbaker v. Railroad Co., 94 Ky. 597, 23 S. W. 509, it was held that a regulation of a railroad company requiring a passenger entering a train without a ticket to pay 25 cents extra fare, this sum to be refunded upon the presentation to any ticket agent on the road of a rebate check furnished by the conductor, is not unreasonable; and a passenger who, with knowledge of the rule, and of the fact that there is no ticket office at the station for which he was destined, failed, before starting on his journey, to buy a round-trip ticket, which he knew he could procure, cannot complain that on his return trip he was ejected from the train on his refusal to pay the 25 cents extra fare. The opportunity to purchase a round-trip ticket, and the knowledge that no ticket could be procured at destination, render inapplicable the rule prohibiting the charging of a higher train fare where no opportunity to purchase a ticket is offered.

reasonable to require the passenger to pay more than regular rates on the train, even though a process is created by which he may at some future time get back the excess, unless the passenger has first had an opportunity to purchase a ticket at the station from which he starts." [6] So, a passenger holding a ticket good for a flag station, who changes his mind while on the journey, and decides to go to the station beyond, cannot be charged more than the ticket rate of fare between these two stations, if the company has no tickets on sale at the flag station. "There is no rule of law or demand of public policy which requires a passenger to decide irrevocably, when he purchases his ticket, where he would leave the train." [7]

But the reasonable opportunity to purchase a ticket is furnished by keeping a convenient office open, under the charge of a competent agent, up to the advertised time fixed for the departure of the train; and it need not be kept open until the actual departure of the train, where there has been a delay in its arrival.[8] And a mere statement by a stranger to a person about to take

[6] Phettiplace v. Railroad Co., 84 Wis. 412, 54 N. W. 1002.

[7] Id.

[8] St. Louis, A. & T. H. R. Co. v. South, 43 Ill. 176; Chicago, R. I. & P. R. Co. v. Brisbane, 24 Ill. App. 463; Swan v. Railroad Co., 132 Mass. 116. A railroad company is not bound to keep a ticket agent at the office, at an ordinary way station, to sell tickets during the stoppage of the train. It is sufficient that the agent was there up to the time of the arrival of the train. O'Byrne v. Railroad Co., 26 Pa. Law J. 117. It is not the company's duty to keep the office open until the time for the departure of the train arrives, and it begins to move, since, as a matter of public policy, no one except those operating it ought to be permitted to get on the train when in motion. State v. Hungerford, 39 Minn. 6, 38 N. W. 628.

a train that he is too late to get a ticket does not relieve him from paying the higher train fare, where the ticket office was in fact open until after the departure of the train.[9]

In some of the states statutes or regulations of railroad commissioners expressly forbid the exaction of a higher train fare than the ticket fare, if a reasonable opportunity has not been given the passenger to purchase the ticket.[10] It has been held that a regulation of the state railroad commission requiring ticket offices to be open a reasonable time before the departure of trains is not a regulation of interstate commerce, as applied to a passenger taking passage on a train within the state to a point in another state; and he cannot be charged the higher train fare if the railroad company had failed to obey the regulation.[11] Under a statute which permits the charge of the higher train fare for passengers having no tickets, where the ticket office is open when the train starts, a railroad company cannot charge a higher train fare if its office is closed, though a statute fixing the time when its ticket office shall be

[9] Union Pac. Ry. Co. v. Wolf, 54 Kan. 592, 38 Pac. 786. It is the duty of a passenger to apply for his ticket before the expiration of the time at which the train is to start, as shown by the time-table. If he applies after that time, though before the train has actually started, and he is unable to procure a ticket either because the office has closed or the agent is engaged in other business, then the person so applying is subject to all the reasonable rules of the company, requiring him to pay a higher rate of fare than he would have had to pay if he had procured a ticket. Illinois Cent. R. Co. v. Bauer, 66 Ill. App. 124.

[10] Ann. Code Miss. 1892, § 3558, prohibits railroads from collecting more than the ticket fare from a passenger who boards the train at a depot or other place where tickets are not on sale.

[11] Hall v. Railroad Co., 25 S. C. 564.

open does not require it to be open at the time when this train started.[12] So, under a statute which requires the ticket office to be kept open a specified time immediately before the starting of trains, it is not sufficient that the ticket office be open, but the agent must be in the ticket office during this time, ready to wait on persons desiring to purchase tickets.[13] If the ticket office was not in fact open the requisite time before the time of departure, it is immaterial whether or not the passenger applied for a ticket during this period.[14] But, where the statute requires the company to give the passenger an opportunity to purchase a ticket "within a reasonable time before the departure of the train," it is not necessary for the company to keep the ticket office at a small station open until the very moment of the departure of the train. All that a passenger can demand is that he have a reasonable opportunity to purchase a ticket; and, in determining whether or not such opportunity was given, it is proper for the jury to consider the character of the station, and whether the

12 Chase v. Railroad Co., 26 N. Y. 523; Nellis v. Railroad Co., 30 N. Y. 505, construing Laws N. Y. 1857, c. 228.

13 Atchison, T. & S. F. R. Co. v. Hogue, 50 Kan. 40, 31 Pac. 698; Atchison, T. & S. F. R. Co. v. Dwelle, 44 Kan. 394, 24 Pac. 500, construing Gen. St. Kan. 1889, par. 1325; Porter v. Railroad Co., 34 Barb. (N. Y.) 353; Fordyce v. Manuel, 82 Tex. 527, 18 S. W. 657, construing Sayles' Civ. St. Tex. art. 4258b, subd. 9. A railroad company which fails to keep its ticket office open, as required by statute, cannot exact a higher train fare from a passenger who was unable to buy a ticket. Atchison, T. & S. F. R. Co. v. Dickerson (Kan. App.) 45 Pac. 975.

14 Missouri Pac. Ry. Co. v. McClanahan, 66 Tex. 539, 1 S. W. 576

facilities for purchasing tickets are such as are required for the convenience of the public at that place.[15]

§ 270. SAME—EXCESSIVE OR UNREASONABLE TRAIN FARE.

A railroad company cannot establish a train fare in excess of the limit of fare fixed by statute, though the ticket fare is within the limit.[1] But the authorities

[15] Everett v. Railroad Co., 69 Iowa, 15, 28 N. W. 410, construing Laws Iowa 1874, c. 68, § 2. Under the laws and rules prescribed by the railroad commission of Georgia, it is the duty of railroad companies to keep their ticket offices open a reasonable time before the departure of trains from all stations, provided that offices at way stations may be closed at one minute before the arrival of trains; and it is the duty of passengers to use proper diligence in supplying themselves with tickets before getting upon trains. A railroad company is not bound to keep a ticket office open each and every minute up to the time it may lawfully close the same, provided a reasonable opportunity is afforded all persons desiring tickets to obtain them; nor is a passenger bound to wait at a ticket office an unreasonable time for the appearance of an agent to sell him a ticket, or to call again and again at the office to procure one, provided in good faith and with due diligence he endeavors to do so before the time for closing the office arrives. In each case it is a question to be determined by the jury whether or not the parties, respectively, performed the corresponding duties devolving upon them, and it is not the province of the court to decide what particular facts will constitute negligence or diligence by either party, and thus restrict the jury in the exercise of their duty in this respect. Applying the rule that good faith, common honesty, and courteous treatment should be observed on both sides, any fair mind ought to be able to decide readily who is in fault when a passenger fails to procure a ticket. Central Railroad & Banking Co. v. Strickland, 90 Ga. 562, 16 S. E. 352.

§ 270. [1] Louisville, N. & G. S. R. Co. v. Guinan, 11 Lea (Tenn.) 98; Zagelmeyer v. Railroad Co., 102 Mich. 214, 60 N. W. 436. The penalty imposed by Laws N. Y. 1857, c. 185, upon railroad corporations for exacting a greater rate of fare than fixed by statute is incurred

are in conflict on the question whether a train fare in excess of the statutory limit is rendered valid by a regulation requiring the conductor to issue the passenger a rebate check for the excess, which may be cashed at any ticket office of the company. In Maryland it has been held that a railroad company has no right to exact of a passenger a higher train fare than the maximum fixed by law, though it issues to him a rebate ticket which entitles him to a sum at the company's office which would bring his fare within the legal limit.[2] But in Pennsylvania it has been held that the fact that an extra charge of ten cents to a passenger not procuring a ticket makes his total fare exceed the authorized statutory charge for transportation does not render such regulation void, where the company provides for the refunding of the ten cents on the presentation at its ticket office of a check to be issued to him by the conductor.[3] On principle, it would seem that the Mary-

where the conductor illegally requires five cents in addition to the legal fare because the passenger had no ticket. Chase v. Railroad Co., 26 N. Y. 523. Where the train fare fixed by a railroad company is unreasonable, and beyond the limits of its authority, and the conductor of the train refuses to accept from a passenger less than the illegal and unauthorized rate, it is not necessary, to entitle the passenger to remain on the train, to tender more than the ticket rate, though the company might have fixed such ticket rate at a higher sum, or exacted more than the ticket fare from passengers on trains. Smith v. Railroad Co., 23 Ohio St. 10. A rule of a railroad company which requires a passenger to either pay an amount in excess of the highest amount that can be legally charged for his passage, or be expelled from the train, is not a valid rule. Atchison, T. & S. F. R. Co. v. Dickerson (Kan. App.) 45 Pac. 975.

2 Baltimore & Y. Turnpike Road v. Boone, 45 Md. 344.

3 Reese v. Railroad Co., 131 Pa. St. 422, 19 Atl. 72.

land decision is right, for the passenger ought not to be put to the trouble of having refunded an excessive charge which the company had no right to make in the first place.

Even in the absence of statute, a railroad company has no right to fix the train fare at an unreasonably high sum, or to unjustly discriminate in its enforcement. But a regulation fixing the train fare 25 cents higher than the ticket fare is not unreasonable.[4] So, an instruction by a railroad company to conductors not to enforce payment of an extra train fare from passengers who have failed to procure tickets, in case such passengers get on at a station where there are no tickets on sale, or in case the crowd on the train is so large as to make it impossible for him to issue refunding checks to such passengers, and also to collect fares and tickets, does not render the regulation requiring the payment of the extra train fare void, as not being general, fair, and impartial.[5]

[4] McGowen v. Steamship Co., 41 La. Ann. 732, 6 South. 606.

[5] Reese v. Railroad Co., 131 Pa. St. 422, 19 Atl. 72; McGowen v. Steamship Co., 41 La. Ann. 732, 6 South. 606. But if the conductor demands a higher rate of fare than he is entitled, under the rules of the company, to demand, the demand is illegal, and the company is responsible if the conductor ejects the passenger for his refusal to comply. Wilsey v. Railroad Co., 83 Ky. 511.

§ 271. ON FREIGHT TRAINS.

A railroad company has the right to prescribe reasonable conditions for the admittance of passengers on its freight trains; and payment of fare to its office agents, or procuring a ticket, prior to taking passage on such trains, is a reasonable condition.[1] So, a rule prohibiting passengers from traveling on through freight trains without the written orders of the division superintendent is reasonable and just; and a passenger cannot travel on such a train, though his ticket reads, "Good on any train." These words have reference only to trains used in the carriage of passengers.[2]

As a general proposition, a railroad company may enforce a rule requiring tickets on freight trains, after giving suitable notice of its existence to the public for such length of time before it is put in operation as to make it reasonably certain that all passengers, in the exercise of due diligence, must become aware of it. In such a case, knowledge of the rule by the passenger against whom it is enforced need not be proved.[3] But a passenger who takes passage on a freight train within a few days after the adoption of the rule should be given personal notice, where the regulation has not

§ 271. [1] Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 457; Toledo, P. & W. R. Co. v. Patterson, 43 Ill. 304; Falkner v. Railway Co., 55 Ind. 369; Law v. Railroad Co., 52 Iowa, 534; Indianapolis & St. L. R. Co. v. Kennedy, 77 Ind. 507.

[2] Thomas v. Railway Co., 72 Mich. 355, 40 N. W. 463.

[3] Burlington & M. R. R. Co. v. Rose, 11 Neb. 177, 8 N. W. 433. It is the duty of the passenger to know of such a regulation before getting on board the train. Southern Kan. Ry. Co. v. Haddal, 38 Kan. 507, 16 Pac. 937.

been generally published, and the company has theretofore been in the habit of receiving money on freight trains.[4]

"But, when the company requires tickets to be purchased at the station, it must furnish convenient facilities to the public by keeping open the office a reasonable time in advance of the hour fixed by the time-table for the departure of trains. Should it fail to do this, a person desiring to take passage would have the right to enter the train, and be carried to his place of destination, by payment of the regular fare to the conductor. To permit a company to complain of the violation of its own rules, necessitated by the negligence of its own agents, would be absurd." [5] So, under a statute which requires railroad companies to maintain depots

[4] Lane v. Railroad Co., 5 Lea (Tenn.) 124; Lake Shore & M. S. R. Co. v. Greenwood, 79 Pa. St. 373.

[5] Chicago & A. R. Co. v. Flagg, 43 Ill. 364. See, to same effect, Illinois Cent. R. Co. v. Johnson, 67 Ill. 312; Cross v. Railroad Co., 56 Mo. App. 664; St. Louis & S. E. Ry. Co. v. Myrtle, 51 Ind. 566. A passenger who is unable to procure a ticket because the ticket office is closed has a right to ride on a freight train carrying passengers on tendering the usual fare, though a rule of the company requires the purchase of tickets; and where he procures a ticket at an intermediate station, and offers to pay in money the fare for the distance already traveled, the conductor has no right to eject him, on the ground that he failed to procure another ticket from the intermediate station to his starting point. Brown v. Railroad Co., 38 Kan. 634, 16 Pac. 942. But in Jones v. Railway Co., 17 Mo. App. 158, it was held that, though a rule of the company forbids passengers to ride on freight trains without a ticket, the company is under no obligation to furnish facilities for obtaining tickets for freight trains at a station at which it has no agent, and at which freight trains are forbidden to take on passengers. So, in Partee v. Railroad, 72 Ga. 347, it was held that the rule of the railroad commission prescribing the manner in which

and receive passengers at intersections with other railroads, a railroad company which has no depot at such a point of intersection cannot expel a passenger from a freight train, who tenders the proper fare, for failure to purchase a ticket before entering the car, as required by the rules of the company.[6] So, railroad companies have no right to discriminate between persons, and sell tickets to some, and refuse others, good for passage on freight trains. A person having duly applied for a ticket, and having been refused, without just cause, would have the same right to be carried upon paying, or offering to pay, the ticket rate of fare, as if he had previously purchased a ticket; and the conductor has no right to charge him the higher train fare.[7]

§ 272. FREE PASS—CONTRACT FOR.

A contract by which a railroad company agrees to issue plaintiff an annual pass receives a practical construction by plaintiff's application for a renewal of the pass at the end of the first year; and after the expiration of the second year, where he neglects to apply for

ticket offices shall be kept open before and after the arrival of trains applies only to regular passenger trains; and one who takes passage on a freight train may be required to pay the higher train fare, though the ticket office was not open.

[6] Eddy v. Rider, 79 Tex. 53, 15 S. W. 113, construing Rev. St. Tex. art. 4238. It was further held that it is a matter of no importance that there was a station not very distant from that at which the passenger entered the car, at which tickets might have been bought; for he was entitled to enter the train at any point made by law a station for the reception and discharge of passengers, and to be carried therefrom to his destination on compliance, or tender of compliance, with the terms prescribed by law.

[7] Indianapolis, P. & C. Ry. Co. v. Rinard, 46 Ind. 293.

a renewal, and is ejected from a train for nonpayment of fare, he cannot be heard to say that it was the company's duty to issue a pass without application therefor.[1] But one whom a railway company has contracted to carry "free of charge" is under no obligation to apply for a pass; and, if none is furnished him, he has a right to ride without one. Hence the company is liable for his expulsion from one of its cars because of his refusal to pay fare.[2]

A verbal agreement by a railroad company, upon valuable consideration, to issue at the first of each year an annual pass to plaintiff, for himself and family, for ten years, is not within the statute of frauds, rendering void oral agreements which are not to be performed within one year from the making thereof, since, by the death of plaintiff and his family, the contract may be performed in one year.[3] A contract to issue or procure the issuance of railway passes, annually, through the life of the promisee, is not an entire contract, but divisible by yearly renewals, and the measure of damages for the breach of the same is the value of the transportation to such promisee during the years the breach has occurred, and may be sued upon for each successive breach.[4]

An agreement of a railroad company to issue plaintiff a pass for life is not binding on the purchaser or lessee of the road, in the absence of an agreement to as-

§ 272. [1] Knopf v. Railroad Co., 85 Va. 769, 8 S. E. 787.

[2] Grimes v. Railway Co., 37 Minn. 66, 33 N. W. 33.

[3] Weatherford, M. W. & N. W. Ry. Co. v. Wood, 88 Tex. 191, 30 S. W. 859; Railway Co. v. English, 38 Kan. 110, 16 Pac. 82.

[4] Curry v. Railway Co. (Kan. Sup.) 48 Pac. 579.

sume the obligation, though it continues to be binding on the original company which made the contract. So, a vote of stockholders of a railroad company to issue to the president a pass for life is a mere license, and is revoked by a lease of the road to another company; and the lessee is not bound to honor the pass.[6] So, an agreement by a railroad company, in consideration of the grant to it of the right to use water from certain land, that the owner of the land should be entitled forever thereafter to travel without charge upon the trains of the company, does not give him a right to free transportation over lines subsequently constructed or leased by it.[7] A passenger holding a pass good to a specified station has the right to be carried thereon to any intermediate station; and the conductor has no right to eject him for refusal to pay fare to that station.[8]

§ 273. REMEDIES OF CARRIER FOR NONPAYMENT.

The carrier has various remedies at his disposal for nonpayment of fare by a passenger. In the first place, if a passenger refuses to give up his ticket or pay fare, an action will lie against him for the amount of his fare.[1]

[5] Eddy v. Hinnant, 82 Tex. 354, 18 S. W. 562; Dallas Consol. Traction Ry. Co. v. Maddox (Tex. Civ. App.) 31 S. W. 702; Dickey v. Railroad Co., 122 Mo. 323, 26 S. W. 685; Ruddick v. Railroad Co., 116 Mo. 25, 22 S. W. 499; Helton v. Railroad Co., 25 Mo. App. 322.

[6] Turner v. Railroad Co., 70 N. C. 1.

[7] Western Md. R. Co. v. Lynch, 82 Md. 233, 34 Atl. 40.

[8] Graham v. Railroad Co., 66 Mo. 536.

§ 273. [1] Northern R. Co. v. Page, 22 Barb. (N. Y.) 130. But one who crosses a river in a boat not belonging to the owner of the

But by far the most common remedy employed by the carrier in such cases is the remedy of self-help; i. e. the ejection of the passenger from the vehicle. This subject is so large that it will be treated in a chapter by itself.[2] But, while the carrier may eject a passenger for nonpayment of fare, it has no right to then and there detain and imprison him until he does pay. At most, the passenger is a debtor to the carrier for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor.[3] But a passenger who attempts to leave a steamer without producing his ticket, as required by the company's rules, and who claims that he has lost it, may be detained on board of the boat for a reasonable time to enable the company to investigate on the spot the circumstances of the case, where he knew of the regulation when he became a passenger.[4]

ferry, and who lands by stepping from the ferryman's boat, is not liable for the rate of ferriage allowed by law, though he may be liable for an invasion of plaintiff's franchise, or for trespass. Henry v. Turner, 2 Port. (Ala.) 23.

[2] See post, c. 24. The carrier has also a lien on the passenger's baggage. See post, § 634.

[3] Lynch v. Railroad Co., 90 N. Y. 77. In this case it was further said: "If defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time, until compliance with its demand. That would be arbitrary imprisonment by a creditor without due process or trial, and continue during his will until the debt should be paid."

[4] Standish v. Steamship Co., 111 Mass. 512. But in Com. v. Schultz (1816) Brightly, N. P. (Pa.) 29, it was held that an agreement between a master of a vessel and a passenger, that the latter shall remain on board until he has paid his passage money, is valid. Tilghman, C. J., said: "Having no money, nor being able to find security at Amster-

In England and in some of the states of this country, it is declared to be a misdemeanor for a passenger to enter a railroad train for passage, with intent to evade payment of fare.[5] The penalty prescribed by the New Jersey statute against any one who enters a train without paying his fare, and with intent to avoid payment of it, is not recoverable from a passenger who takes a train which does not stop at the station for which he holds a ticket, and who rides to the station beyond without payment of fare, where he was informed when he took the train that it stopped at the station named in his ticket.[6]

dam, they stipulated not to leave the brig till they had paid their passage money. They knew very well that they could make no money during the passage, nor could they expect to borrow it when they arrived in a strange country. But it was also known that, by indenting themselves to serve for a term of years, the money might be raised; and in order to secure the captain who carried them over the sea, and supplied them with provisions, they promised not to leave the brig until they had paid for their passage, which in substance amounted to an engagement to raise the money by indenting themselves before they left the brig. Their object was to advance their fortunes in a new country,—an object which had been frequently attained by their countrymen who had gone to America before them; and it is not easy to conceive any better means of accomplishing their object than those which were taken. It is not probable that any such agreement would be held valid in the United States to-day. The system of indenting emigrants for a series of years would probably violate the amendment to the federal constitution abolishing slavery and involuntary servitude except as a punishment for crime.

[5] Pub. St. N. H. 1891, p. 454, § 7; Revision N. J. p. 912, §§ 18, 19; 1 Comp. Laws Utah, 1888, p. 796; V. S. 1894, § 3917. See, also, post, p. 783.

[6] Harris v. Railroad Co., 58 N. J. Law, 282, 33 Atl. 799. A passenger who has paid his fare to a certain station, and who leaves the train at an intermediate station, the fare to which exceeds the fare

§ 274. RECOVERY BACK BY PASSENGER.

Where one pays passage money, to be transported from one place to another, the contract is absolute to transport to the place of destination; and, if the vessel is lost on the voyage, the contract is broken, and the passenger may recover back the entire passage money. Nor is the nonperformance excused by inevitable accident or necessity, even though this proceed from the act of God.[1] But where a vessel deviates from her

charged for the station to which his ticket was issued, does not violate a by-law of the company, subjecting a passenger who enters a carriage without having paid his fare to a penalty. Reg. v. Frere, 4 El. & Bl. 598. A by-law of a railway company requiring a passenger to show and deliver up a ticket whenever required, under a penalty of paying fare from the point at which the train originally started to the end of his journey, is unreasonable and void, because the penalties imposed are not equal, and vary according to the distance the train has traveled, so that a passenger who has traveled only the last few miles will have to pay as much fare as one who started at the first station. Saunders v. Railway Co., 5 Q. B. Div. 456; Dyson v. Railway Co., 7 Q. B. Div. 32. In Brown v. Railway Co., 2 Q. B. Div. 406, it was held that, under such a by-law, the company must make demand of the specific sum payable before it can recover the same from the passenger.

§ 274. [1] Cope v. Dodd, 13 Pa. St. 33; Stone v. The Relampago, 23 Fed. Cas. 158. See, also, Brecknock Canal v. Pritchard, 6 Term R. 750; Howland v. The Lavinia, 1 Pet. Adm. 126, Fed. Cas. No. 6,797. Passage money is not due until the end of the voyage; and, if the vessel does not proceed to destination, the passenger has the right to recover the entire passage money. Howland v. The Lavinia, 1 Pet. Adm. 126, Fed. Cas. No. 6,797. Plaintiff took passage on defendant's vessel from San Francisco to Panama, paying in advance therefor $50. The ship was wrecked in a storm, and plaintiff was put ashore at a point less than half the distance to the port of destination, without any provision made by defendant to send him on to destination.

direct course through necessity, and puts into a port for repair, and the owner then sends her on a different voyage, a passenger, to whom the owner offered a passage on another vessel, larger and more commodious than his own, from the port of distress to his destination, and who refuses such offer, cannot recover from the owner any part of his passage money, since it is his own fault that he did not pursue his journey.[2]

It is perhaps questionable whether or not the same principles would apply to carriage by railway.[3] The question seems not to have been raised in any case of land travel. It has, however, been held that where a purchaser of a season ticket, entitling him to travel by defendant's railway for one month, makes a deposit over and above the price charged for the ticket, on condition, among other things, that the deposit is to be forfeited if the ticket is not delivered up on the day after its expiration, the ticket holder must perform the condition as it is written; and he cannot recover the deposit on showing a tender of the ticket after the time limited, though it was within a reasonable time thereafter.[4]

Held, that plaintiff was entitled to recover the entire amount of passage money paid by him, on the theory that the contract of carriage was an entire one, and that nothing was earned thereunder until plaintiff had been carried to his destination. Brown v. Harris, 2 Gray (Mass.) 359.

2 Detoucher v. Peck, 9 Johns. (N. Y.) 210.

3 See post, § 535, as to measure of damages for failure to carry passenger to destination.

4 Cooper v. Railway Co., 4 Exch. Div. 88. In an action against a railroad company by the purchaser of a commutation ticket good for 60 rides, who fails to use the whole of it, to recover the value of the

unused portion, the company, in computing the damages, is entitled to charge full fare for the rides actually taken on the ticket, and not the reduced rate, that being a condition specified in the ticket. Smith v. Railroad Co., 11 Pa. Co. Ct. R. 555. In an old English case it was held that if a person takes a place on a stagecoach, and pays at the time only a deposit, as half fare, for example, and is not at the inn when the coach is setting off, the proprietor of the coach is at liberty to fill up his place with another passenger; but if, at the time of taking his place, he pays the whole of the fare, the proprietor cannot dispose of his place, but he may take it at any stage of the journey he sees fit. Ker v. Mountain (1793) 1 Esp. 27.

CHAPTER XXII.

TICKETS.

§ 275. Nature and Effect.
276. Conditions and Stipulations in Ticket—Construction.
277. Collection and Surrender of Tickets.
278. Same—Detaching Coupons from Mileage or Commutation Tickets.
279. Loss of Ticket.
280. Riding Extra Distance or Part of Distance.
281. Riding in Reverse Direction from That Indicated on Ticket.
282. Assignability of Ticket.
283. Forfeiture of Ticket.
284. Provision for Identification of Purchaser.
285. Limitation as to Time.
286. Same—Limitation by Regulation not Expressed in Ticket.
287. Same—Limitation must be Reasonable.
288. Same—Construction of Limitation.
289. Same—Waiver of Limitation.
290. Same—Maine Statute.
291. Continuity of Journey.
292. Same—Coupon Tickets.
293. Same—Stop-Over Privileges.
294. Same—California Statute.
295. Street-Car Transfers and Tickets.

§ 275. NATURE AND EFFECT.

A ticket issued to a passenger by a carrier, merely naming the stations between which it is good, is in the nature of a receipt, rather than of a contract between the parties.

A passage ticket merely naming the places between which it is good for passage does not purport to be a contract. It is rather in the nature of a receipt for the

passage money; and its office is to serve as a token to enable the persons having charge of the carrier's vehicle to recognize the bearer as the person who is entitled to be carried.[1] Indeed, in some modes of conveyance—that by street car, for example—it is not customary for the carrier to issue any ticket. So, in cases where tickets are issued, the principal duty of the carrier—that of exercising care for the passenger's safety—is never expressed therein. It has even been held to be unnecessary for the ticket to express in words what the law tacitly implies.[2] So far, however, as the terms of carriage are set forth in the ticket, they are binding, of course, provided they do not conflict with some law or rule of public policy.[3] But, so far as not expressed, parol evidence is admissible to show the elements of the contract.[4] Thus, it has been held that the rules

§ 275. [1] Quimby v. Vanderbilt, 17 N. Y. 306; Williams v. Vanderbilt, 28 N. Y. 217, affirming 29 Barb. (N. Y.) 491; Rawson v. Railroad Co., 48 N. Y. 212, 217.

[2] Gordon v. Railroad, 52 N. H. 596.

[3] Howard v. Railroad Co., 61 Miss. 194; Dietrich v. Railroad Co., 71 Pa. St. 432. In an action to recover the value of a railroad ticket, lost before use, by the terms of which plaintiff and his family were entitled to ride 25 trips, evidence that, at the time of its purchase, the ticket agent orally agreed to issue a duplicate in case of loss, is inadmissible, under the rule that an instrument in writing may not be added to by proof of a contemporaneous oral agreement, and that the writing, if not ambiguous, except in cases of fraud, mistake, or surprise, is conclusive of what the parties have agreed. Simis v. Railroad Co., 1 Misc. Rep. 179, 20 N. Y. Supp. 639.

[4] See cases supra; Peterson v. Railway Co., 80 Iowa, 92, 45 N. W. 573; Burnham v. Railway Co., 63 Me. 298. A substantial independent contract of carriage will govern the rights of the parties, though it is not expressed in the ticket. Van Buskirk v. Roberts, 31 N. Y. 661.

and regulations of the company as to the running of its trains are admissible in its favor.[5]

The possession of a railroad ticket, it has been held, is prima facie evidence that the holder has paid the regular price for it, and that he has the right to be transported at some time, between the places specified therein, on some passenger train. And, if it is unmutilated, the presumption is that it has never been used for that purpose. It is therefore evidence of the agreement or undertaking of the corporation to transport the holder to the place mentioned, on its passenger cars, for a consideration by him paid.[6]

§ 276. CONDITIONS AND STIPULATIONS IN TICKET —CONSTRUCTION.

It has become customary for carriers of passengers to issue tickets containing many conditions and stipulations. The question as to the legality of some of these conditions,[1] and as to whether they are binding on a passenger from the mere fact that he receives the ticket, without any other manifestation of assent,[2] are questions which will be subsequently considered.

But one who signs the conditions on the back of a railroad ticket assents to their terms, so far as they are legal and valid. It would tend to disturb the force of

[5] Dietrich v. Railroad Co., 71 Pa. St. 432; Lake Shore & M. S. Ry. Co. v. Rosenzweig, 113 Pa. St. 519, 536, 6 Atl. 545. As to the conclusiveness of the ticket as between passenger and conductor, see post, § 317 et seq.

[6] Pier v. Finch, 24 Barb. (N. Y.) 514.

§ 276. [1] See post, §§ 389, 627.

[2] See post, §§ 399, 629.

all such contracts if one in possession of ordinary capacity and intelligence were allowed to sign a contract, and act under it in the enjoyment of all its advantages, and then to repudiate it, upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentation, or mistake, it must be presumed that he read the contract, and assented to all its terms.[3]

In construing a special contract embodied in a railroad ticket, and limiting the purchaser's rights, language of uncertain or doubtful meaning should generally be taken in its strongest sense against the company by which the ticket was issued and sold, and in favor of the purchaser. This rule of construction is in accord with common sense. "It may be supposed that one who himself writes or prepares a written contract in which he is interested will be sure to use language which he conceives is best adapted to secure to himself

[3] Bethea v. Railroad Co., 26 S. C. 91, 1 S. E. 372. The failure of a purchaser of a ticket, sold at a reduced rate, to sign the conditions thereto attached, does not invalidate the ticket, where he was not requested to sign it, and the company retains the consideration, since such signature is merely a mode of identifying the purchaser. Gregory v. Railroad Co., 10 Neb. 250, 4 N. W. 1025. A condition in a thousand-mile ticket, requiring it to be stamped by the agent selling it, and signed by the purchaser, is waived by the sale and delivery of the ticket to a purchaser, ignorant of the condition, without insisting on its fulfillment, and by honoring the ticket for several trips without requiring it to be signed. And a conductor is not thereafter justified, while the company still retains plaintiff's money, in ejecting him from its cars, for his failure to sign the ticket, which has already gone into full effect between the parties, and for his refusal to pay the usual fare in money for a passage which was already paid for. Kent v. Railroad Co., 45 Ohio St. 284, 12 N. E. 798.

the full benefit of everything he could claim under the agreement the writing is intended to evidence. It is therefore allowable and just, at the instance of the opposite party, to scan critically the phraseology employed. * * * This is obviously right for the additional reason that as the purchaser had nothing whatever to do with preparing the ticket, and had no voice in the wording of it, it was his right to claim under it the benefit of the strongest interpretation which could be made in his favor."[4]

§ 277. COLLECTION AND SURRENDER OF TICKETS.

A rule or custom of a railroad company requiring passengers to surrender their passage tickets to the conductor on demand, and receive his check in place of them, is a reasonable rule or custom; and a passenger's refusal to surrender the ticket on demand will justify the conductor in exacting from him his fare in cash, and, on his refusal to pay, in expelling him from the car.[1] But a passenger cannot be required to give

[4] Georgia Railroad & Banking Co. v. Clarke (Ga.) 25 S. E. 368. As to construction of limitation as to time, see post, § 288. As to construction of limitation of liability, see post, § 401.

§ 277. [1] Northern R. Co. v. Page, 22 Barb. (N. Y.) 130; Baltimore & O. R. Co. v. Blocher, 27 Md. 277; Bennett v. Railroad Co., 7 Phila. (Pa.) 11. The regulations of a railroad company that a monthly commutation ticket shall be surrendered by the passenger to the conductor on the last trip taken during the period for which it is issued is a reasonable regulation of the railroad company in the conduct of its business as a common carrier of passengers; and if this regulation be indorsed on the ticket, and the passenger holding the ticket fails or refuses to surrender it on his last trip, or pay his fare to the conductor, according to the legally established rates of the company,

up his ticket, short of the station to which it entitles him to be carried, unless a check is tendered him, to show that he has paid his fare.[2] After a conductor has taken up a ticket, he is required to exercise more than ordinary care in seeing that the passenger is provided with a check or other means of continuing his journey.[3] A regulation that the conductor or ticket collector of a crowded suburban train shall not permit passengers to go past him, into that part of the train where he has completed the collection of tickets, unless they present their tickets, pay their fare, or satisfy him that they have done so, is a reasonable one; and the passenger must conform to it, whether or not he had notice of it when he purchased his ticket. If a passenger, in violation of the rule, undertakes to pass the conductor, the latter is justified in using reasonable force to prevent it, and in ordering him to leave the train or pay fare.[4]

§ 278. SAME—DETACHING COUPONS FROM MILEAGE OR COMMUTATION TICKETS.

A condition in a coupon ticket that the coupons are to be detached by or in the presence of the conductor, and that they will be accepted "for passage only when

he can be ejected from the car. Rogers v. Railroad Co. (N. J. Sup.) 34 Atl. 11.

[2] State v. Thompson, 20 N. H. 250. Where the passenger shows the conductor his ticket, but declines to give it up unless furnished with a seat, the conductor has no right to seize it, and take it by force against the passenger's will, even though the passenger may have waived his right to a seat. Cincinnati, C., C. & I. Ry. Co. v. McLean, 1 Ohio Cir. Ct. R. 112.

[3] Sloane v. Railway Co., 111 Cal. 668, 44 Pac. 320.

[4] Faber v. Railway Co., 62 Minn. 433, 64 N. W. 918.

accompanied by the ticket," is reasonable and valid.[1] The refusal of the passenger to show his ticket to the conductor on demand, and his insistence upon making payment of his fare with coupons which he himself has detached, are a violation of the contract by him, for which he may be put off the train, with such force as may be necessary in case he refuses to go voluntarily.[2] A conductor has the right to determine for himself from what part or parts of a mileage book the coupons are to be detached, since he is the person who is authorized to detach them, and he is not bound to heed the passenger's request to tear the coupons out of the back part of the book, instead of the front part.[3]

It has even been held that a condition in a mileage ticket sold at a reduced rate, that coupons are not good for passage if detached, is valid; and where the passenger detaches them himself, though warned to desist by the conductor, the latter is justified in refusing to receive the detached coupons, even when the passenger offers the ticket or book to identify the coupons.[4]

§ 278. [1] Boston & M. R. R. v. Chipman, 146 Mass. 107, 14 N. E. 940. When a coupon ticket on a street railroad, good for 20 rides, provides that the coupons are not good unless torn off by the conductor, the passenger has no right to detach a coupon from the main ticket, and present it to the conductor, and at the same time refuse to show the main ticket. In such a case he may be ejected from the car. Walker v. Railroad Co., 33 How. Prac. (N. Y.) 327.

[2] Louisville, N. & G. S. R. Co. v. Harris, 9 Lea (Tenn.) 180.

[3] Eaton v. McIntire, 88 Me. 578, 34 Atl. 525.

[4] Norfolk & W. R. Co. v. Wysor, 82 Va. 250. One who tenders a detached coupon, when the rules of the company require the coupon to be detached by the conductor, is in the same condition as if he had refused to pay any fare at all. De Lucas v. Railroad Co., 38 La. Ann. 930. A thousand-mile ticket, good over the road of the selling

But the holder of a round-trip ticket has the right to ride from the return station to the going station on the return coupon, though he has not used the going coupon; and the fact that the going coupon becomes worthless when detached from the return coupon furnishes the company with no excuse for refusing to accept the return coupon unless the entire ticket is surrendered.[5] But such a condition may be waived by the parties after the purchase of the ticket. The practice of receiving as fare the detached coupons, without presentation of the rest of the ticket, is evidence of such waiver. Conceding that the carrier has a right to revoke his consent to such waiver after he has received some of the detached coupons, it is his duty to give reasonable notice of such intended revocation. If, without such notice, and relying on such waiver, the holder of the ticket detaches a coupon, and takes it with her on the train, without taking the rest of the ticket, the carrier cannot, when such coupon is thus presented for fare, revoke his consent to the waiver, so as to deprive her of the use of the coupon, or compel her to pay extra fare.[6] So, also, a condition in the going coupon of

company and that of a leased road, contained two sets of figures,—300 black figures, and 700 red figures,—and directions to the conductor to punch out the red figures for miles traveled on the selling road, and the black figures for miles traveled on the leased road. The ticket was signed by the purchaser, who expressly assented to all its terms. Held that, after the red figures had been exhausted by travel over the selling road, the purchaser had no right to travel on that road by virtue of the unpunched black figures. Terre Haute & I. R. Co. v. Fitzgerald, 47 Ind. 79.

[5] Chicago, St. L. & P. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837.

[6] Thompson v. Truesdale, 61 Minn. 129, 63 N. W. 259.

a round-trip ticket that it shall be void if detached from the going coupon, is waived by the conductor's mistake in detaching the return coupon, and detaining it on the going trip.[7]

§ 279. LOSS OF TICKET.

The loss of a ticket by a passenger falls on him, and not on the carrier.[1] The reason is obvious. Passage tickets, in the absence of restrictive conditions, are assignable, and are good in the hands of any one. If the loss of a ticket were a sufficient excuse for nonpayment of fare, the carrier might be subjected to the burden of carrying two or more persons for a single fare. This rule holds good even in the absence of any stipulation in the ticket; and, of course, a condition in a commutation ticket, sold at a reduced rate, that no duplicate ticket will be issued, is binding on the holder; and if, by casualty, his ticket has been lost, so that he cannot produce it, the company may exact from him the regular fare paid by other passengers.[2] Nor is there any distinction in the rights of the passenger whether he loses or mislays his ticket before getting on the train or

7 Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439.

§ 279. 1 Standish v. Steamship Co., 111 Mass. 512; Duke v. Railway Co., 14 U. C. Q. B. 369, 377. If, by any inadvertence, carelessness, or casualty, the ticket of a passenger has been lost by him, so that he cannot produce it, the legal fare may be exacted from him; and the conductor is not bound to investigate the excuse of the passenger for its nonproduction, and determine whether it is made in good faith or not. He has the right to have the ticket produced or surrendered, or the fare paid; and, if neither event occurs, he can expel the passenger. Rogers v. Railroad Co. (N. J. Sup.) 34 Atl. 11.

2 Ripley v. Transportation Co., 31 N. J. Law, 388.

afterwards. Hence the fact that passengers are required to exhibit their tickets to a train hand before entering the train does not excuse a passenger from surrendering his ticket to the conductor on demand; and the fact that the passenger has lost or mislaid it after getting on the train gives him no right to ride without payment, as required by the rules of the company.[3] So, a passenger who surrenders his ticket or coupon to a conductor, and receives from him a check evidencing his right to ride, must produce it on demand by another conductor, who took charge of the train afterwards. If the check has been lost, the loss is the passenger's, and he must pay his fare or leave the train, since it can be used by a third person, and the company may be thus defrauded.[4]

But it has been held that, though a rule of a sleeping-car company requiring the conductor to receive either a ticket, a pass, or money before giving a passenger a berth is reasonable and just, yet where a passenger furnishes a conductor with clear and satisfactory evidence that he has purchased a ticket entitling him to a particular berth, but has lost it, and the circumstances are such that it is reasonably certain the company cannot be defrauded by the ticket being in the hands of another, he ought to have the berth.[5]

[3] Louisville, N. & C. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128, 148.

[4] Jerome v. Smith, 48 Vt. 230.

[5] Pullman Palace Car Co. v. Reed, 75 Ill. 125. See, also, post, § 317 et seq., as to duty to produce a proper ticket to the conductor.

§ 280. RIDING EXTRA DISTANCE OR PART OF DISTANCE.

One who boards a train at a more remote station than that indicated as the starting point of his journey by his ticket cannot travel the extra distance on his ticket, but must pay fare from the station where he got on to the starting point designated in his ticket.[1] "A regulation by which railroads, when passengers are found on their trains who have no tickets, or who have only forfeited tickets, require of such passengers fare, not only for that part of the route to be traveled, but also for the part already passed over, is certainly a reasonable one. If persons who are attempting to ride without paying fare can have the past forgiven, and need pay only from the place and time of their detection, would not this be the offer of a premium for an attempted undue advantage of the railroad?" [2] So, where a

§ 280. [1] Illinois Cent. R. Co. v. Billington (Ky.) 30 S. W. 885; Chicago & E. I. R. Co. v. Adams, 60 Ill. App. 571.

[2] Manning v. Railroad Co., 95 Ala. 392, 11 South. 8. But a somewhat different conclusion has been reached where the passenger boards a train under the belief that he has a valid ticket, and it turns out that it is not good. A passenger who had stopped off at an intermediate station was informed by the conductor, on resuming his journey, that his ticket was not good, and that he would have to pay fare or get off at the next station. When the train arrived at the station, the passenger, who had acted in good faith, purchased a new ticket for his destination. The conductor declined to receive it, unless he paid the fare from the station where he boarded the train to the station where he purchased the ticket. Held, that his ejection from the train, on refusing to pay the fare demanded, was wrongful, since he had done nothing to forfeit his right to make a contract of carriage by the purchase of a ticket. Ward v. Railway Co., 56 Hun, 268, 9 N. Y. Supp. 377.

railroad company issues an excursion ticket at a reduced rate, conditioned that it shall be void if used for any other train or station than that named therein, the passenger is not entitled to travel beyond that station, and merely pay the ordinary single fare for the distance traveled, but he must pay full fare for the entire distance traveled.[3]

On the other hand, a railroad ticket entitling a designated person to a stated number of single continuous trips, for each of which a separate coupon is attached, "between" two specified stations, and stipulating that "passage shall be taken only on such trains as stop at the above-named stations," and also that "this ticket shall be good for continuous trips" between these stations, confers upon that person, upon surrendering one of the coupons, the right to ride from an intermediate station to either of the two stations mentioned in the ticket, or from either of those stations to the intermediate station, provided he boards a passenger train which, upon its regular schedule, stops, not only at the specified stations, but at the intermediate station also. Although entitled to ride the whole distance, the passenger could waive or relinquish this right in part, and accept only a portion of the ride his coupon called for.[4]

[3] Great Northern Ry. Co. v. Palmer, 15 Reports, 296. One who purchases a street-car ticket "good only between" two specified streets may board a car at a place remote from the starting point named in the ticket, pay his fare to that point, and then ride on the ticket to the destination named therein. McMahon v. Railroad Co., 47 N. Y. Super. Ct. 282.

[4] Georgia Railroad & Banking Co. v. Clarke (Ga.) 25 S. E. 368. See, also, ante, § 272.

§ 281. RIDING IN REVERSE DIRECTION FROM THAT INDICATED ON TICKET.

A passenger cannot ride in the reverse direction from that indicated on his ticket.[1] It is certainly a reasonable requirement that a passenger, having the opportunity, should purchase his ticket to the place of his destination, and not in the opposite direction. To compel railroad companies to receive unused tickets, without regard to the direction in which the holder wishes to go, would introduce inextricable confusion into their business, and be of no benefit to any person possessed of sufficient intelligence to go upon a train.[2] But a passenger who has purchased a round-trip ticket has the right to be carried, on his return trip, on presenting the going coupon, with the explanation that the conductor on the going trip, by mistake, retained the return-trip coupon, and returned the going coupon to the passenger, who failed to discover the mistake until presenting it to the conductor on the return trip.[3]

§ 282. ASSIGNABILITY OF TICKET.

In the absence of any restriction in a passage ticket, it is assignable, and passes from hand to hand by delivery.[1] It may be used by a person other than the

§ 281. [1] Coleman v. Railroad Co., 106 Mass. 160; Keeley v. Railroad Co., 67 Me. 163.

[2] Godfrey v. Railway Co., 116 Ind. 30, 18 N. E. 61.

[3] Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381.

§ 282. [1] Spencer v. Lovejoy, 96 Ga. 658, 23 S. E. 836; The Willamette Valley, 71 Fed. 712. Mills' Ann. St. Colo. p. 1986, § 3728, pro-

one named in the ticket, though sold at a reduced rate.[2] A coupon ticket over several lines, not limited on its face as to ownership and continuity of passage, is transferable after it has been used over some of the connecting lines.[3] Railroad tickets do not, however, possess any of the qualities of negotiable paper. The holder of such a ticket is in no better position than the bona fide purchaser, for value, of goods from one in possession, without notice of any defect in his vendor's title. Hence, where the possession of such a ticket has been obtained from the company by fraud, a purchaser from the holder, though for value and without notice of equities, takes no better title than the person who fraudulently obtained possession.[4]

But a condition in a ticket sold at a reduced fare, that it can be used only by the purchaser, is reasonable and valid; and a third person cannot, by purchasing such a ticket, acquire the right to travel thereon; and, if he refuses to pay his fare, he may be expelled from the train.[5] And a condition in a mileage ticket that it

vides that railroad tickets shall be assignable by delivery, and that tickets may be limited as to time, but not as to person.

[2] Nichols v. Southern Pac. Co., 23 Or. 123, 31 Pac. 296; Hoffman v. Railroad Co., 45 Minn. 53, 47 N. W. 312; Carsten v. Railroad Co., 44 Minn. 454, 47 N. W. 49.

[3] Nichols v. Southern Pac. Co., 23 Or. 123, 31 Pac. 296.

[4] Frank v. Ingalls, 41 Ohio St. 560.

[5] Post v. Railroad Co., 14 Neb. 110, 15 N. W. 225; Drummond v. Southern Pac. Co., 7 Utah, 118, 25 Pac. 733. One who claims the right to travel on a 1,000-mile commutation ticket as a member of the firm to whom it was issued, but who has not signed the conditions on the back thereof, must establish the existence of the partnership to whom the ticket was issued, and the fact that he was a member thereof, before he can hold the company liable for a conductor's refusal to permit

shall not be good in the hands of any person other than the original purchaser is not waived by the failure of the purchaser to sign the ticket.[6] So, a railroad company which sells a ticket good over the lines of several connecting railroads has no power, so far as the connecting roads are concerned, to waive a condition restricting its use to the first purchaser; and one of the connecting roads is not bound to honor the ticket in the hands of one who, with knowledge of the condition, purchased it from a "scalper," though it had been placed in the hands of the scalper for sale by the first carrier.[7]

§ 283. FORFEITURE OF TICKET.

A ticket conditioned to be void if presented by any person other than the original holder may be taken up by the conductor on its presentation by a purchaser from a ticket broker, and the refusal to return the ticket to the purchaser cannot result in damages to him.[1]

him to ride on the ticket. Granier v. Railroad Co., 42 La. Ann. 880, 8 South. 614. A railroad ticket which on its face purports to be good for a man and his family authorizes a son, who is residing with the father as a member of his family, to ride upon the road, though he was over 21 years of age. Schedules furnished the public are not admissible to show that adult sons are not entitled to ride on the ticket, but it must appear that notice of the regulation was given the purchaser when he bought the ticket. Chicago & N. W. Ry. Co. v. Chisholm, 79 Ill. 584.

6 Rahilly v. Railway Co. (Minn.) 68 N. W. 853.

7 Comer v. Foley (Ga.) 25 S. E. 671.

§ 283. 1 Drummond v. Southern Pac. Co., 7 Utah, 118, 25 Pac. 733. But in Post v. Railroad Co., 11 Neb. 110, 15 N. W. 225, it was held that, where a nontransferable ticket authorizes the company to "refuse to accept this ticket" on failure of the purchaser to comply with its terms, the conductor has no right to take it up when presented by a person other than the one to whom issued. And, though such person

So, a ticket containing a condition of forfeiture if used by any person other than the one to whom issued may be taken from him when tendered in payment of fare, if it was used by any other person, either with his connivance or through his negligence. "From the character of the ticket, and its liability to be used by another, in fraud of the agreement that it is to be used only by the person to whom issued, the implied obligation rested on him, when he accepted it from the company, to keep it with due and proper care. If, from his negligence, it came into the hand of another, and was fraudulently used on the company's road, he is just as amenable to its forfeiture as if it had been used with his assent." [2] So, a pass issued to a person on the false representation that he is in the employ of a newspaper, made by the editor of the paper, may be taken up and forfeited by the company on discovering the fraud, if the person to whom the pass was isssued was a privy to the fraud.[3]

has no right to travel on the ticket, yet he may recover the value of a ticket of the same class between the points named if it is taken up by the conductor. This decision is vicious in the extreme. The ticket, after its transfer, in violation of its conditions, was of no value, either in the hands of the transferee or of the original holder, or in the hands of any other person. To permit the holder to recover its full value under these circumstances is so glaringly unjust as not to require any further comment.

[2] Freidenrich v. Railroad Co., 53 Md. 201.

[3] Moore v. Railroad Co., 41 W. Va. 160, 23 S. E. 539. Where a stock pass is issued to a woman on a fraudulent representation that she is part owner of the stock, the conductor has the right to refuse to honor it; and the company is not liable for his act in handing her from the train without incivility or violence; whereupon her fare was paid by her husband, who was on the train, and she re-entered the train, and proceeded on her journey. Brown v. Railway, 64 Mo. 536.

§ 284. PROVISION FOR IDENTIFICATION OF PURCHASER.

A condition in a round-trip excursion ticket, sold at a reduced rate, requiring the purchaser to identify himself to the ticket agent at destination, and the return coupon to be stamped and dated by such agent, is reasonable and valid.[1] Such a condition is intended to prevent tickets from passing into the hands of third persons, and being used by them in making portions of the transit, where higher rates of fare are required than the special rates which the companies are able to make to through passengers traveling a long distance.[2] The purchaser of such a ticket is bound by the condition, whether he knows of it or not.[3] So, where the condition is that the purchaser shall identify himself to the "satisfaction" of the agent at destination, the agent is the one who must determine the sufficiency of the identification; and the question cannot be submitted to the jury whether he ought to have been satisfied.[4] And a

§ 284. 1 Edwards v. Railway Co., 81 Mich. 364, 45 N. W. 827; Galena v. Railroad, 13 Fed. 116; Bethea v. Railroad Co., 26 S. C. 91, 1 S. E. 372; Bowers v. Railroad, 158 Pa. St. 302, 27 Atl. 893; Goetz v. Railroad Co., 50 Mo. 472.

2 Cloud v. Railway Co., 14 Mo. App. 136.

3 Boylan v. Railroad Co., 132 U. S. 146, 10 Sup. Ct. 50; Moses v. Railroad, 73 Ga. 356. But in Phillips v. Railroad Co., 93 Ga. 356, 20 S. E. 247, it was held that under Code Ga. § 2068, which provides that a common carrier cannot limit his liability by any notice or entry on the ticket sold, but must do so by express contract, such a condition for identification is not binding on the purchaser, if he had no knowledge of its existence when he purchased.

4 Bethea v. Railroad Co., 26 S. C. 91, 1 S. E. 372. The court said: "That officer was not indicated an 'agent' for the purpose of perform-

purchaser of such a ticket, who has neglected to identify himself to the agent, has no right to identify himself to the conductor at the time of his expulsion from the train for noncompliance with the condition. The safer rule is to abide by the contract as it is written, as to the time and manner of identification, and not open the door for other methods.[5]

Considerable conflict in the authorities exists where the ticket requiring identification at the terminal point is good over the lines of several connecting carriers, and the agent at the terminal point wrongfully neglects or refuses to stamp the ticket. The supreme court of South Carolina has held that a coupon ticket, good over several connecting lines, which expressly states

ing a merely ministerial act; but, on the contrary, it was made his duty to judge of the sufficiency of the evidence of identification; not whether the plaintiff had reasonably identified himself by handwriting or otherwise, but whether he was identified to the satisfaction of the person named. That officer may have been unnecessarily hard to satisfy, but that was the test required by the contract itself."

[5] Abram v. Railway Co., 83 Tex. 61, 18 S. W. 321. But, under a condition in a mileage ticket that, when requested by the conductor, the purchaser will sign his name, in the presence of the conductor, on the back of one of the coupons, and "otherwise identify himself" as the purchaser, the conductor has no right to arbitrarily refuse the holder of the ticket permission to sign his name for the purpose of identification, and to require him to adduce other evidence of identity, though it may be otherwise where the passenger is permitted to sign his name, and the conductor is left in doubt as to identity. Norfolk & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. 757. Where a round-trip ticket from a station in South Carolina to New Orleans requires the purchaser to present the ticket for stamping, and to identify himself, at Baltimore, the word "Baltimore" will be considered as a misprint for New Orleans, and the contract requiring stamping and identification for the return trip is not thereby invalidated. Bethea v. Railroad Co., 26 S. C. 91, 1 S. E. 372.

that the selling company acts as agent for the other companies, "and is not responsible beyond its own line," relieves the selling company from liability for the defaults of the connecting lines; and, where the ticket further requires the holder to present it at the terminal point to the agent of the terminal line for restamping and for identification, the agent is thereby made the agent of all the companies, and the selling company is not liable for the refusal of the other companies to carry the holder on the return trip because of such agent's wrongful refusal to stamp the ticket.[6] The United States supreme court has gone still further, and has held that even the first carrier is not bound to honor such a ticket on the return trip, where the purchaser has failed to comply with the provisions for identification and stamping, though such failure was due to the default of the ticket agent of the last carrier at the terminal point. That default was the default of the agent of the last line, for which the first carrier is not responsible, under the stipulation that its liability is limited to its own line.[7] On the other hand, it has been recently held, with a great deal of reason, that by selling a round-trip ticket, good over two connecting lines of railroad, containing a condition requiring the passenger to identify himself to the ticket agent of the connecting line at destination, and requiring that agent to stamp the ticket, the first carrier makes that agent its own special agent for the purpose of identification and

[6] Bethea v. Railroad Co., 26 S. C. 91, 1 S. E. 372.

[7] Mosher v. Railroad Co., 127 U. S. 390, 8 Sup. Ct. 1324, affirming 23 Fed. 326, 17 Fed. 880, followed in Central Trust Co. v. East Tennessee, V. & G. R. Co., 65 Fed. 332.

stamping; and where he refuses to stamp the ticket, saying that it is all right without stamping, the first carrier is liable for the ejection of the passenger on his return trip after reaching its line, and is not relieved from such liability by a condition in the ticket that "it is not responsible beyond its own line." [8]

The condition for identification may be waived by the subsequent conduct of the parties.[9] But such condition is not waived by the fact that a gateman permitted the passenger to pass through the gate without examining or punching the ticket, and that the conductor of the sleeping car failed to notice that the ticket was unstamped.[10] So, the voluntary act of the conductor of one of several connecting lines of railway in honoring the ticket is not binding on any of the succeeding carriers, and any one of them may object to the passenger's failure to have himself identified at destination, as required by the terms of the ticket.[11]

8 Gulf, C. & S. F. R. Co. v. St. John (Tex. Civ. App.) 35 S. W. 501; Head v. Railway Co., 79 Ga. 358, 7 S. E. 217.

9 Taylor v. Railroad Co., 99 N. C. 185, 5 S. E. 750. In this case it was held that, to show such a waiver, it is competent to prove that an agent of the carrier, other than at the station designated in the contract, recognized the ticket by permitting the passenger to identify himself, and by stamping it for the return trip.

10 Bowers v. Railroad, 158 Pa. St. 302, 27 Atl. 893. Nor is such condition waived by the action of the baggage man in punching the ticket, and checking the passenger's baggage, nor that of the gateman in admitting him to the train. Boylan v. Railroad Co., 132 U. S. 146, 10 Sup. Ct. 50.

11 Cloud v. Railway Co., 14 Mo. App. 136.

§ 285. LIMITATION AS TO TIME.

In the absence of any limitation as to the time within which a ticket is to be used by the purchaser, it is undoubtedly good for a passage at any time within the statutory period of limitation as to contracts.[1] It seems at first to have been doubted whether it was competent for a passenger carrier to enter into a contract limiting the time within which the holder of a ticket should avail himself of the right to use it. But it is now definitely settled that a stipulation in a ticket limiting the time within which it shall be used is valid and binding on the purchaser.[2] Thus, a dated single-trip ticket, which states that it is "good for this day only," cannot be used on a day subsequent to its purchase.[3]

§ 285. [1] Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142. A somewhat different ruling seems to have been made in Canada. In an action for the ejection of a passenger, it appeared that he presented a ticket which must have been sold 16 months before, and which the conductor refused to accept on that ground. It also appeared that on other occasions plaintiff had presented an old ticket, and, on its being rejected, had paid fare. Held that, the circumstances being suspicious, the mere production of the ticket was not sufficient to entitle plaintiff to recover, but that it should have been left to the jury to say whether plaintiff had procured it fairly, or was attempting an imposition. Davis v. Railway Co., 20 U. C. Q. B. 27.

[2] Little Rock & F. S. Ry. v. Dean, 43 Ark. 529; Hill v. Railroad Co., 63 N. Y. 101, affirming 2 Hun (N. Y.) 114, 4 Thomp. & C. (N. Y.) 685; Barker v. Coffin, 31 Barb. (N. Y.) 556; Farewell v. Railway Co., 15 U. C. C. P. 437; Grogan v. Railway Co., 39 W. Va. 415, 19 S. E. 563.

[3] Elmore v. Sands, 54 N. Y. 512; State v. Campbell, 32 N. J. Law, 309; Shedd v. Railroad Co., 40 Vt. 88; Boice v. Railroad Co., 61 Barb. (N. Y.) 611. A railroad passenger ticket, which is dated, and bears upon its face a printed statement, "Good only two days after date," ceases to be valid after the expiration of the two days. Boston & L.

So, a stipulation in a round-trip ticket, good for 30 days, that the purchaser shall have himself identified at the terminal point of his journey, and that the ticket shall be good only for 15 days after the date of identification, is not illegal or unreasonable; and the passenger cannot travel on the ticket after the expiration of the 15 days from the identification, though the 30-day limit has not expired.[4] So, a condition on the return coupon of a round-trip excursion ticket that it is good only one day from the date of sale, unless it is extended by the agent at destination, is valid.[5] So, the holder of a mileage ticket, or a commutation ticket good for a certain number of rides, which by its terms is limited to a specified time from its date, has no right to travel thereon after the expiration of the stipulated period, though a portion of the ticket remains unused.[6]

R. Co. v. Proctor, 1 Allen (Mass.) 267. A passenger who knows that a railroad company is in the habit of selling tickets limited as to time is bound to know the time limit stamped on the back of a ticket purchased by him; and, where the ticket is limited to expire on the day of sale, he cannot ride on it after carrying it around in his pocket for several days without using it. McGhee v. Drisdale, 111 Ala. 597, 20 South. 391. But the words "Good for this trip only," upon a passage ticket, will not limit the undertaking of the company to any particular day, or any specific train of cars. They do not relate to time, but to a journey; and, if the ticket has not been previously used, it entitles the holder to a passage on a subsequent day, as well as on the day it bears date. Pier v. Finch, 24 Barb. (N. Y.) 514.

[4] Rawitzky v. Railroad Co., 40 La. Ann. 47, 3 South. 387.

[5] Missouri, K. & T. Ry. Co. v. Murphy (Tex. Civ. App.) 35 S. W. 66.

[6] Lillis v. Railway Co., 64 Mo. 464; Powell v. Railroad Co., 25 Ohio St. 70.

§ 286. SAME—LIMITATION BY REGULATION NOT EXPRESSED IN TICKET.

There is a conflict in the authorities as to whether a carrier can fix a time limit by a regulation not expressed in the ticket, as against a passenger who has no knowledge of the regulation. In Pennsylvania it has been held that such a regulation is not valid as against a passenger who did not know of it, and that he is not bound to make inquiries about such a regulation of the company which does not appear in the ticket.[1] But in New Hampshire it has been held to be the passenger's duty to make inquiry as to all reasonable regulations of the carrier when he purchases his ticket, and that he is bound by a regulation limiting the time within which a ticket must be used, though he knew nothing about it, and though his ticket was unlimited on its face.[2] It

§ 286. [1] Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142.

[2] Johnson v. Railroad Corp., 46 N. H. 213. In this case it was said: "It might be suggested that in a case like the present it would be quite practicable to indorse some notice of the change of rule on the ticket; but when we take into account the number of changes of different regulations, important to travelers, that may become essential to convenient and safe transportation, and the frequency of their necessity, we think it can hardly be practicable to place notices of all such changes upon the ticket; and, if it were, it would be far from insuring actual notice to all passengers. It seems to us that such a requirement would not prove of sufficient practical value to counterbalance its inconveniences. If it is understood by the public that the duty is on the traveler to inquire as to all such reasonable regulations as it may be important for him to know, we think that there will result less inconvenience than from any holding of the law that tends to relieve the traveler from the duty of inquiring as to a part of such matters of regulation."

would seem that the Pennsylvania decision is right in principle, because a passenger has a right to presume that a ticket unlimited as to time is good whenever used, and it is no great hardship to require railroad companies to express such a limitation of the common law on the ticket.

§ 287. SAME—LIMITATION MUST BE REASONABLE.

The time limited on a railroad ticket within which a trip must be completed must, in order to be binding, allow sufficient time for a person using ordinary diligence to accomplish the trip.[1] The carrier must afford a purchaser of a limited ticket the necessary facilities for accomplishing his journey within the stipulated time, and, upon the failure to do so, he is not in position to treat the contract of carriage as forfeited, and demand a second payment of fare for the same passage, at least if the ticket holder avail himself of the first opportunity to complete the journey after the expiration of the time limited.[2] Thus, where a carrier induces a number of passengers to go on an excursion for a speci-

§ 287. [1] Gulf, C. & S. F. R. Co. v. Wright (Tex. Civ. App.) 30 S. W. 294. When a railway undertakes to sell an excursion ticket, to be used within a certain time, it must see that the time agreed upon is reasonable, from the standpoint of the then existing circumstances and conditions, and that the passenger, by the exercise of reasonable diligence, may complete the journey within the time agreed upon. If such time be reasonable, the railway company selling such ticket, with liability limited to its own line, would not be liable for delays by other lines on the route, and could insist on the terms of the ticket when presented after the time specified therein. Id., 2 Tex. Civ. App. 463, 21 S. W. 399.

[2] Little Rock & F. S. Ry. v. Dean, 43 Ark. 529.

fied purpose,—as, for example, to attend a public auction of town lots,—it should allow them a reasonable time in which to accomplish the purpose of the journey; and, in the absence of knowledge to the contrary on the part of the passenger, he has a right to infer that the limitation contained in the ticket will do this.[3] The supreme court of Texas has said that a through ticket, good over several connecting lines, not in the form of a coupon ticket, is a joint undertaking on the part of all the roads; and the last carrier is bound to honor the ticket after the time limited therein has expired, when it appears that plaintiff's delay was owing to the default of one of the intermediate carriers. But when the ticket is in the form of coupons, and expressly states that the selling company acts only as agent, and is not responsible beyond its own line, each coupon becomes the separate contract for the line for which issued; and, if the last coupon is not presented by the passenger within the time limited, the last company is not bound to carry him, though his delay was caused solely by a wreck on an intermediate road, and though he exercised all possible diligence in prosecuting the journey. His only remedy would be against the carrier causing the delay.[4]

§ 288. SAME—CONSTRUCTION OF LIMITATION.

Where a railroad ticket is conditioned that it shall be void after a certain time, the passenger may commence his journey at any time before midnight of the last day, and need not complete the journey within the time

3 Texas & P. Ry. Co. v. Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400.

4 Gulf, C. & S. F. Ry. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039.

mentioned.[1] The language printed on the ticket must be regarded as the language of the carrier; and, if it is of doubtful import, the doubt should not be solved to the detriment of the passenger. If it had been intended by the carrier that the journey should have been completed on or before the last day limited, such limitation should have been plainly expressed, and not be left in such doubt as might and naturally would mislead passengers.[2] Besides, the contract should be so construed as to prevent a forfeiture if it can be done.[3] Where the time limit fixed by a round-trip ticket expires on a Sunday, and the carrier does not run a train on that day, the passenger has a right to commence his return trip on the first train of the following day, under the rule that, if a contract matures on a Sunday, the performance is to be exacted on the next day.[4] So, the fact that a ticket bears a date several days prior to the date of sale does not deprive the purchaser of the right to travel on it the day it is sold, under its provision that it is good "within one day of date of sale." [5]

§ 288. [1] Lundy v. Railroad Co., 66 Cal. 191, 4 Pac. 1193; Georgia S. R. Co. v. Bigelow, 68 Ga. 219; Evans v. Railway Co., 11 Mo. App. 463; Briggs v. Railway Co., 24 U. C. Q. B. 510. A railroad ticket containing the stipulation that it is good for "a continuous passage on and from the date stamped on the back" is limited to use upon the day it is dated, and such further time as is necessary to complete the continuous passage. Texas & N. O. R. Co. v. Powell (Tex. Civ. App.) 35 S. W. 841.

[2] Auerbach v. Railroad Co., 89 N. Y. 281, reversing 60 How. Prac. (N. Y.) 382.

[3] Evans v. Railway Co., 11 Mo. App. 463; Little Rock & F. S. Ry. v. Dean, 43 Ark. 529.

[4] Little Rock & F. S. Ry. v. Dean, 43 Ark. 529.

[5] Ellsworth v. Railway Co. (Iowa) 63 N. W. 584.

But a passenger whose ticket expires at midnight has no right, by reason of the purchase of such a ticket, to take a train which starts at 12:45 a. m. But, though he is improperly on the train, he may show that he was there by mistake, and that he tendered to the conductor the ticket, which, under the statutes of the state, the company was obliged to redeem, together with a sufficient sum of money to make the full fare. And such evidence makes the question whether he was a trespasser, whom the company had the right to eject, one for the jury.[6]

§ 289. SAME—WAIVER OF LIMITATION.

Where a ticket is sold at less than the usual rates, on the condition that it shall not be used after a time limited, the passenger, by accepting and using the ticket, makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for his contract. The fact that the agent informs him that the ticket is "good until used" cannot vary this contract. If he has been misled or misinformed by the seller as to the terms, he has a right to return the ticket, and receive back his money. The railroad company agrees to carry him at the reduced rate, upon the conditions stated on the face of the ticket. If he agrees to those terms, the contract is consummated; but he cannot take advantage of the reduction of the rate, and reject the terms on which alone the reduction was made.[1] So, where an excursion ticket

[6] Arnold v. Railroad Co., 115 Pa. St. 135, 8 Atl. 213.

§ 289. [1] Pennington v. Railroad Co., 62 Md. 95. A verbal declaration of a ticket agent, made after the purchase of a ticket limited to

states that it may be exchanged at destination for a return ticket, "good for the day and train designated on the face of such exchange ticket," the passenger cannot use the exchange ticket on another train and on another day than that indicated thereon, though the advertisement for the excursion stated that tickets would be good to return for five days.[2] But it has been held that, though a ticket is stamped as "good for this day only," the purchaser may show by parol that he asked for a ticket on which he could stop over at an intermediate station for a day, and that the ticket agent represented to him that he could do so on that ticket. The fact that the ticket agent was not authorized to make such a contract does not warrant the passenger's expulsion from the train, without returning to him his pro rata share of the fare.[3]

The time limit in a railroad ticket is not waived by the act of the baggage master in checking the passenger's baggage, and punching the ticket on its presentation to him. The baggage master's apparent authority extends only to due attention to the passenger's baggage, and not to the validity of his ticket.[4] Nor does

the date of its issuance, that it is good at any time, is not a contract varying the time limit expressed in the ticket, in the absence of any proof that the agent had authority to make an oral contract for the company varying the one indicated by the ticket. Boice v. Railroad Co., 61 Barb. (N. Y.) 611.

[2] Howard v. Railroad Co., 61 Miss. 194.

[3] Burnham v. Railway Co., 63 Me. 298. A ticket limited to the day on which issued cannot be used on the following day, unless the passenger, on ordering his ticket, notified the ticket agent that he wanted a different one. Lewis v. Railroad Co., 93 Ga. 225, 18 S. E. 650.

[4] Wentz v. Railway Co., 3 Hun (N. Y.) 241.

the fact that a mileage ticket was used by a passenger a number of times after the expiration of the time limited therein estop the company from taking up the ticket, and requiring the payment of fare.[5] Where, however, the time limit on a round-trip excursion ticket is extended by a duly-authorized agent of the company, the conductor of the train has no right to refuse the ticket, and expel the passenger.[6]

§ 290. SAME—MAINE STATUTE.

By statute, in Maine, a railroad ticket is made binding on the company for six years from its date, and confers on the holder the right to stop off at usual stopping places during that period.[1] It was at one time held that this statute applied to a ticket sold within the state for a passage to a point without.[2] But it was subsequently held that the statute applies only to transportation within the territorial limits of the state; that it has no force beyond such limits, and consequently does not apply to a ticket from Portland to Montreal, while it is being used beyond the limits of the state.[3] In a still later case it was held that the statute does

[5] Sherman v. Railroad Co., 40 Iowa, 45. In this case it was said: "The ticket itself was express notice to plaintiff and the conductors that the latter had no right to accept the ticket in payment of fare, and that it was his duty to pay fare, and their duty to take up the ticket and collect the fare. His wrongful conduct 20 times could not make his twenty-first effort rightful. The essential elements of estoppel, as against defendant, are all wanting."

[6] Randall v. Railroad Co., 45 La. Ann. 778, 13 South. 166.

§ 290. [1] Rev. St. c. 51, § 44, adopted in 1883.

[2] Dryden v. Railway Co., 60 Me. 512.

[3] Carpenter v. Railway Co., 72 Me. 388.

not apply to a ticket purchased in Canada for a continuous passage, on a particular day, on a railroad, from that country through portions of the states of Vermont and New Hampshire, into Maine. Such an application of the statute would work an interference with both foreign and interstate commerce in the carriage of passengers, within the prohibition of the federal constitution.[4] So the supreme judicial court of Massachusetts has held that the Maine statute applies only to transportation within the limits of that state, and does not authorize one who has purchased a ticket in Maine, for transportation to Massachusetts, to stop over at will at an intermediate station in Massachusetts.[5]

§ 291. CONTINUITY OF JOURNEY.

In the absence of any understanding, or of rules and regulations to modify the contract, the purchase and sale of a ticket good from one station to another create an obligation on the part of the carrier to carry by continuous service to the passenger's destination. The carrier has no right to perform its part of the contract by a series of carriages from station to station by different trains, at its convenience, but is bound, when the passenger selects the train he wishes to go on, to carry him to his destination without unreasonable delay. The rights of the parties in this respect are reciprocal, and therefore the passenger, after the carrier has entered on the performance of its obligation, has no right

[4] Lafarier v. Railway Co., 84 Me. 286, 24 Atl. 848, expressly overruling Dryden v. Railway Co., supra.

[5] Boston & M. R. Co. v. Trafton, 151 Mass. 229, 23 N. E. 829.

to demand performance by breaking the transit, and resuming the journey again at another time. By voluntarily leaving the train at an intermediate station, the passenger takes from the carrier the opportunity of completing its contract, and thereby releases it from further obligation to do so.[1] And, of course, if the ticket is expressly limited to a particular train or for a continuous journey, the passenger has no right to stop off at an intermediate station, and afterwards resume his journey on another train, without paying fare.[2]

It is the duty of a passenger to inform himself whether or not he can make the continuous journey called for by his ticket on the train on which he embarks. He has no right to take a train which does not run to his destination, and leave it at some intermediate point, and there take passage on a through train to his desti-

§ 291. [1] Hatten v. Railroad Co., 39 Ohio St. 375; Drew v. Railroad Co., 51 Cal. 425; Churchill v. Railroad Co., 67 Ill. 390; Stone v. Railroad Co., 47 Iowa. 82; McClure v. Railroad Co., 34 Md. 532; Cheney v. Railroad Co., 11 Mete. (Mass.) 121; Wyman v. Railroad Co., 34 Minn. 210, 25 N. W. 349; State v. Overton, 24 N. J. Law. 435; Terry v. Railroad Co., 13 Hun (N. Y.) 359; Oil Creek & A. R. Ry. Co. v. Clark, 72 Pa. St. 231; Dietrich v. Railroad Co., 71 Pa. St. 432; Breen v. Railroad Co., 50 Tex. 45; Roberts v. Koehler, 30 Fed. 94. The fact that a ticket is good for 20 days does not give a passenger the right to stop over at an intermediate station, though he completes his entire journey in 20 days. Craig v. Railroad Co., 24 U. C. Q. B. 504.

[2] Pierce v. Pennsylvania Co., 19 Fed. Cas. 637; Gale v. Railroad Co., 7 Hun (N. Y.) 670; Johnson v. Railroad Co., 63 Md. 106. A passenger holding a ticket limited as to time and to a particular train was directed to the wrong train by the company's servants. The conductor put him off at the next station, and at that station he took the train designated by the ticket. Held, that the conductor of that train had no right to eject him, because the ticket called for a continuous passage. Elliott v. Railroad Co., 53 Hun, 78, 6 N. Y. Supp. 363.

nation, even though the latter train may be the one he should have taken in the first instance.[3] This rule requiring a continuous journey holds good in case of a passenger who, at an intermediate station, changes from a local to a fast through train, which reaches his destination at an earlier hour than the train on which he first took passage.[4] So, the right to a continuous passage on a ticket refers to a continuous passage by the person to whom the ticket is issued; and he cannot transfer his right to complete the journey on the train on which he took passage to another person at an intermediate station.[5]

But a passenger is not bound to commence his journey at the point named in his ticket. He may, if he chooses, purchase another ticket to an intermediate station, and then make a continuous journey on his original ticket from such intermediate station to destination. He may rightfully enter a train at a point nearer the place of destination than the station named in his ticket.[6] So, if, from accident, misfortune, or other cause, and without the passenger's fault, his transit be

[3] Gulf, C. & S. F. Ry. Co. v. Henry, 84 Tex. 678, 19 S. W. 870; Johnson v. Railroad Co., 63 Md. 106.

[4] Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 457; Pennsylvania R. Co. v. Parry, 55 N. J. Law, 551, 27 Atl. 914.

[5] Walker v. Railway Co., 15 Mo. App. 333; Cody v. Railroad Co., 4 Sawy. 114, Fed. Cas. No. 2,940.

[6] Auerbach v. Railroad Co., 89 N. Y. 281, reversing 60 How. Prac. (N. Y.) 382. But the fact that the train does not depart at its advertised time does not give a passenger who has purchased a ticket "good for this day only" the right to leave the train at an intermediate station, and then resume his journey on another train. Briggs v. Railway Co., 24 U. C. Q. B. 510.

interrupted, and it be more than an ordinary delay, then he may resume his journey afterwards, upon a different train, and without the payment of fare. Hence, where a train is delayed at about dark by a wreck on the road, and a sick passenger is informed that the delay will last several hours, and perhaps all night, he is not required to remain on the car an indefinite time; and, if he goes to an hotel during the night, he has the right to resume his journey on another train the next day, without payment of additional fare.[7]

It has been held that when a passenger gets on a train at an intermediate station to complete his journey, which he began at another time and on another train, and tenders his unused ticket, the conductor has no right to retain it, and at the same time deny his right to ride under it. Nor has the conductor any right to eject the passenger where he offers to pay his fare on the return of the ticket to him.[8]

§ 292. SAME—COUPON TICKETS.

A coupon ticket issued by a railroad company over its own and connecting lines is an entire contract as to each line, but severable as between the different lines. When the passenger enters on the journey over any

[7] Wilsey v. Railroad Co., 83 Ky. 511.

[8] Vankirk v. Railroad Co., 76 Pa. St. 66. The court said: "The conductor required payment, not only for the ride plaintiff was then taking, but also the yielding up of a ticket on which he was not riding. The conductor had no such right. To concede to him the right to demand of a passenger anything additional to the payment of fare would be fraught with much the most mischievous consequences." But see ante, § 283, as to the right to forfeit tickets, and post, § 338, as to duty of returning ticket to passenger on ejection.

one of the lines, he is bound to continue without stop to the end of his journey thereon. He may, however, stop over at the end of each line.[1] In such a case the last carrier cannot complain that the passenger stopped off at stations not on its line.[2] This principle is also applicable to coupon tickets over a line of railway owned by the same company, but divided into separate divisions, for each of which there is a coupon upon the ticket. Each coupon, in the absence of special "stop-over" privileges, requires the traveler to make a continuous journey over the division for which it is issued. It is a sort of separate and independent contract for carriage over that division; but, when the end of the division is reached, the passenger may leave the train, and subsequently resume his journey on another train over the next division, upon the coupon issued for it.[3]

§ 292. [1] Nichols v. Railroad Co., 23 Or. 123, 31 Pac. 296; Brooke v. Railway Co., 15 Mich. 332; Little Rock & F. S. Ry. Co. v. Dean, 43 Ark. 529.

[2] Auerbach v. Railway Co., 89 N. Y. 281, reversing 60 How. Prac. (N. Y.) 382. But the passenger cannot leave the train on one of the roads, and afterwards continue his journey on another train on the same road. Kelsey v. Railroad Co., 28 Hun (N. Y.) 460. Where a railroad ticket is purchased, good for a continuous passage over connecting roads, and from any cause not the fault of the passenger, or the result of his carelessness or wrong, the company is prevented from making a connection according to the letter of its contract, and the passenger is left over, he has a right to go upon the first train of the company to his point of destination, and is in no sense a trespasser in attempting to properly exercise that right. Watkins v. Railroad Co., 21 D. C. 1.

[3] Spencer v. Lovejoy, 96 Ga. 657, 23 S. E. 836. Where, by the rules of the company, a passenger has the right to stop over at the end of each division of the road, he cannot stop off at places other than the

§ 293. SAME—STOP-OVER PRIVILEGES.

A ticket "good to stop off at all points" justifies the passenger in stopping off at a station short of his destination, and subsequently, within the life of his ticket, taking another train to his destination; and though, on his presentation of his ticket to the conductor, with notice of his intention to stop over, the conductor takes it up, and gives no check or token in lieu thereof, the passenger's rights will not be prejudiced; and the same conductor, with knowledge of all the facts, will not be justified in ejecting him from the train, on his subsequent resumption of the journey.[1] But, if the ticket confers no right on the passenger to stop over, he must comply with the terms of a stop-over check given to him by the conductor, and he cannot use it after the time limited therein has expired.[2]

end of his division, and resume his journey, without paying fare to the end of his division; and it is immaterial that he is ignorant of the rules. Dunphy v. Railway Co., 42 N. Y. Super. Ct. 128.

§ 293. [1] Cherry v. Railroad Co., 52 Mo. App. 499.

[2] Churchill v. Railroad Co., 67 Ill. 390. A passenger holding a through ticket, who desired to stop off at an intermediate station, asked the conductor to indorse his ticket for this purpose, as required by the rules of the company. The conductor informed him that this was unnecessary, and the passenger got off. He resumed his journey on another train, and no question was raised about his ticket. Before reaching his destination, he got off at another station, without applying for any indorsement; and, when he resumed his journey on a third train, the conductor refused to honor his ticket, and ejected him for nonpayment of fare. Held, that the privilege granted him by the conductor of the first train was exhausted when he embarked on the second train, and that he then became subject to all the company's regulations, and could not again stop over at a way station without having his ticket indorsed. Denny v. Railroad Co., 5 Daly (N. Y.) 50.

Where a ticket agent sells a ticket good over several connecting lines of railroad, with a representation that the purchaser may stop off at any point on any of the roads, the question whether such representation formed part of the contract, and whether he had authority to bind the connecting roads by a stipulation in reference to the right to stop over on their lines, is a question of fact for the jury.[3] But the fact that the conductor of a train which does not go through to a passenger's destination permits the passenger to ride to an intermediate station does not confer any right on the passenger to take the proper train at the intermediate station, and complete his journey on the original ticket.[4]

[3] Robinson v. Railroad Co., 2 Lea (Tenn.) 594. In this case the court said: "A ticket is not such a written contract as to exclude parol representations made on the sale of the ticket." Where a passenger, on applying for information to a train agent or conductor, is informed by him that he may get off at a station, and continue his journey by the next train upon the same ticket, and the passenger, relying upon such statement, leaves the train at the station, the company is bound to carry him on the next train to the end of his route upon that ticket, and is estopped from denying the right of the conductor to make that agreement, and from asserting that a stop-over check is required. Tarbell v. Railway Co., 24 Hun (N. Y.) 51.

[4] Gulf, C. & S. F. Ry. Co. v. Henry, 84 Tex. 678, 19 S. W. 870. A passenger who has stopped off at an intermediate station, and who enters another train, and claims the right to continue his journey on his ticket, under permission given him by the conductor of the first train, cannot shift his position at the trial when it appears that only train agents have the power to modify the force of tickets, and rely for a recovery for his ejection on the fact that a train agent, and not a conductor, had given him the privilege claimed. Petrie v. Railroad Co., 42 N. J. Law, 449.

§ 294. SAME—CALIFORNIA STATUTE.

The California Code [1] provides that every railroad ticket entitles the holder to ride to the station or depot of destination, or to any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any time within six months after it is issued. This statute, it has recently been held, is still in force; and, to entitle a passenger to stop over under it, it is not necessary that he procure a ticket with stop-over privileges, but he may do so on any ticket sold at the regular established fare; and, if the company desires to limit this right, it may sell tickets at a reduced rate, with provisions against stop-over privileges.[2]

§ 295. STREET-CAR TRANSFERS AND TICKETS.

By accepting a transfer check, designating the point at which the passenger is to take the transfer car, a passenger consents to the regulations of the street-car company as to the mode of making the transfer; and he has no right to enter the car at a point other than that designated on the transfer check, without payment of fare.[1] Nor can a passenger who accepts a transfer check for another line, without objection, ride over a line not designated in the transfer, with-

§ 294. [1] Civ. Code, § 490.

[2] Robinson v. Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722. It was also held that this statute applied to the Southern Pacific Company.

§ 295. [1] Percy v. Railway Co., 58 Mo. App. 75.

out payment of fare.[2] So, a passenger to whom has been issued a commutation check, good over a connecting line, is not entitled, after he has once changed cars, and surrendered the check in the second car at the request of a conductor, to a passage in a third car proceeding further on the same line, though the second car stops short of the point to which he intended to go, and though he is told by the conductor of that car that he may ride in the third car without payment of fare.[3]

There is nothing unreasonable in a requirement that a transfer ticket from one route of a street railway to another shall not be honored unless used within 15 minutes after its delivery to the passenger, in the absence

[2] Carpenter v. Railroad Co., 121 U. S. 474, 7 Sup. Ct. 1002. Under a city ordinance which gives a passenger who has paid one fare on any line operated by the company in the city a right to a transfer check entitling him to a continuous passage over any connecting or crossing line, a passenger who applies for and accepts a transfer check for one of several connecting or crossing lines, plainly marked and designated, will be limited to the line so selected; but where the route designated is not so limited, but is equally applicable to several lines, he will be entitled to be transported over any one of them. Pine v. Railway Co., 50 Minn. 144, 52 N. W. 392.

[3] Ames v. Railway Co., 117 Mass. 541. Under Pub. St. Mass. c. 113, § 47, which prohibits commutation checks issued by street railways in the city of Boston from being used over the same route on which the check was issued, or a route parallel thereto, and between and including two common points, the holder of such a check, in returning towards his starting point, is not entitled to be carried, upon the check, in the car of another company, whose route is substantially parallel to the route of the company issuing the check, and is between and includes two common points, although a wide detour is made at one place in the route of the latter company. Cronin v. Railway Co., 144 Mass. 249, 10 N. E. 833.

of a charter, ordinance, or contract to the contrary; and a passenger who takes the connecting car after the expiration of the 15 minutes may be ejected for refusal to pay fare, unless it is the first car that passes the point of transfer after alighting. "It is the duty of a passenger receiving such a transfer to read it; and his failure to do so cannot give him any rights against the company which he would not have had had he read it, and thus been advised as to the time limitation." [4]

The rules of a street-railroad company carrying passengers over two sections of its road for one fare, which require a passenger boarding the car on the first section to keep and show, undetached by him, a coupon ticket, as a voucher of his right to ride on the second section, is reasonable and valid; and a passenger who presents a detached coupon to the conductor of the second section may be ejected.[5]

[4] Heffron v. Railway Co., 92 Mich. 406, 52 N. W. 802.

[5] De Lucas v. Railroad Co., 38 La. Ann. 930.

CHAPTER XXIII.

DUTY TO CARRY PUNCTUALLY AND TO DESTINATION.

§ 296. Punctuality in Running Time.
297. Same—Ferrymen.
298. Duty to Carry from Place of Departure to that of Destination.
299. Failure to Take on Passenger.
300. Failure to Carry to Destination.
301. Same—Announcing Station.
302. Regulations as to Stopping Places for Trains.
303. Same—Passenger's Duty to Know Regulations.
304. Same—Rights and Duties of Passenger on Wrong Train.
305. Same—Representations of Ticket Agent.
306. Same—Waiver by Conductor.
307. Same—Waiver by Custom.
308. Regulations Restricting Tickets to Particular Trains.
309. Restriction as to Train in Ticket.
310. Restriction as to Route.

§ 296. PUNCTUALITY IN RUNNING TIME.

The publication of a time-table, in common form, imposes on a common carrier the obligation to use due care and skill to have his conveyance arrive and depart at the precise time indicated in the table; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the carrier liable for want of punctuality which is not attributable to his negligence.

The publication of a time-table by a common carrier cannot amount to less than a representation that it is ordinarily practicable for him, by the use of due

care and skill, to run according to the table, and an engagement on his part that he will do all that can be done by the use of due care and skill to accomplish that result. But the carrier's duty does not go beyond this. He is not a warrantor or insurer of punctuality any more than he is a warrantor or insurer of safety in transportation.[1] By issuing a ticket for a train advertised to arrive at destination at a specified hour, a railroad company merely contracts to use due diligence to have the train arrive at the hour specified; and when the train is delayed by reason of floods, and therefore fails to make connection with another train at an intermediate station, the company is not bound to derange its ordinary traffic by at once putting on a special, and it may wait for the next regular train.

§ 296. [1] Gordon v. Railroad, 52 N. H. 596. A statement in the official time-table of a sleeping-car company that the departure of its train from Paris corresponds with the arrival of a certain train from London is not a warranty of the punctuality of the arrival of the London train, and does not render it liable in damages to a passenger on the London train, who had secured berths on the sleeping-car train, but who missed it because the London train had not arrived in Paris at its advertised time. Lockyer v. Trains Co., 61 Law J. Q. B. 501. A railroad company, which fails to run its train according to its published schedule, unless prevented by some valid reason, is liable to one who goes to the depot to take that train, for the damages actually sustained by him as the direct and necessary result thereof. Savannah, S. & S. R. Co. v. Bonaud, 58 Ga. 180. In many of the states, railroad companies are required by statute to run their trains at regular times, to be fixed by public notice. Mansf. Dig. Ark. § 5475; Rev. St. Ind. 1894, § 5185 (Rev. St. 1881, § 3925); Gen. St. Kan. 1889, par. 1212; Gen. St. Ky. 1889, § 783; 1 How. Ann. St. Mich. § 3324; Rev. St. Mo. 1889, §§ 2582–2584; Comp. Laws Neb. 1893, c. 16, § 121, p. 312; Comp. Laws N. M. 1884, § 2671; Laws N. Y. 1850, c. 140, § 36; Code N. C. 1883, § 1963; Sayles' Civ. St. Tex. art. 4226.

though that is also delayed by floods.[2] So, a carrier by steamer is not responsible for delay in the transportation of a passenger caused by a defect in the rudder post of the vessel, which defect was not discoverable before leaving port.[3]

But the purchaser of a ticket has a right to rely on information given him by the ticket agent at a union station, of whom he purchased the ticket, as to the time when the train will arrive at his destination.[4]

A railroad company, or other common carrier, of course, possesses the power of changing the running time of its trains, on giving reasonable notice to the public. A regulation of a railroad company that no train shall enter an Indian reservation within six hours

[2] Fitzgerald v. Railway Co., 34 Law T. (N. S.) 771. The mere taking of a ticket for a railway journey does not amount to a contract by the company, or impose on it the duty, to have a train ready to start at the time at which the passenger is led to expect it. "The only duty which the law attaches to such a contract (a ticket to convey a passenger from one place to another) is that the passenger will be carried in a reasonable time." Hurst v. Railway Co., 19 C. B. (N. S.) 310, 34 Law J. C. P. 264. In the common stipulation on railway tickets, that the company shall not be liable for any delay in the starting and arrival of trains arising from "accident or other cause," the words "or other cause" mean other causes in the nature of accident, and not any cause whatever; and hence the neglect of the fireman to light the fire in time, in consequence of which the engine has not sufficient steam up to draw the train, is not within the exemption. Buckmaster v. Railway Co., 23 Law T. (N. S.) 471.

[3] Neal v. Allan, 18 Nova Scotia, 449.

[4] Turner v. Railway Co., 15 Wash. 213, 46 Pac. 243. Where, on breach by a carrier of its contract to carry plaintiff to his destination, due to the destruction of its road, plaintiff, on the advice of the carrier's conductor, takes the train of another line, and is also delayed on the second line by reason of washouts, the first carrier is liable for such second delay. Id.

of noon on the day it is thrown open for settlement, and that all trains shall be stationed on the edge of the reservation thirty minutes before the hour of opening, and shall not be entered by passengers before that time, is a reasonable regulation, being adopted in accordance with a proclamation of the secretary of the interior. To that extent, the usual schedule time is abandoned; and a passenger for a station within the reservation, who refuses to leave a train which has stopped at the edge, under this regulation, may be ejected.[5] But reasonable notice of a change in running time must be given to the public. Thus, a passenger who presents himself at a station to take a train advertised to start at 9:30 p. m., but who finds that it has been postponed for two hours for the accommodation of passengers desirous of attending a public entertainment, may recover from the company for his expenses incurred in hiring a horse and buggy to take him to his destination, where the railroad company failed to give proper notice to the public of the change in time.[6]

[5] Decker v. Railroad Co., 3 Okl. 553, 41 Pac. 610.

[6] Sears v. Railroad Co., 14 Allen (Mass.) 433. A railroad company which, by means of its published time-tables, represents that it will carry to a station on a connecting road, is liable, as for a false representation, to a passenger who purchased his ticket to such station, but who was unable to reach his destination without delay, because the connecting carrier had taken off its train for the advertised station before the publication of the time-table. Denton v. Railway Co., 5 El. & Bl. 860.

§ 297. SAME—FERRYMEN.

The duty to exercise reasonable diligence in the transportation of passengers devolves on ferrymen as well as other common carriers. A ferryman cannot excuse a delay of 14 hours in transporting a passenger on the ground of high water, since it is his duty to provide himself with proper boats to accommodate the public at all stages of water.[1] So a ferryman is bound to transport persons across the stream after night;[2] and one who has been detained at a ferry from 6 o'clock in the evening until 6 o'clock in the morning may recover the legal penalty for unreasonable detention at a ferry, unless there are special circumstances which would make it dangerous to cross with the ferry.[3]

§ 298. DUTY TO CARRY FROM PLACE OF DEPARTURE TO THAT OF DESTINATION.

The duty of a common carrier to transport a passenger from the place of departure to that of destination is not an absolute duty; but it must afford the passenger a reasonable time and opportunity to board the vehicle at the place at which it agreed to receive him, and to leave it at the place to which it agreed to transport him. The carrier has also the right to make

§ 297. [1] Jabine v. Midgett, 25 Ark. 474.

[2] Pate v. Henry, 5 Stew. & P. (Ala.) 101.

[3] Koretke v. Irwin, 100 Ala. 323, 13 South. 743.

reasonable rules and regulations as to the stoppage of trains at the different stations along its route.

As in all other cases involving carriers of passengers, the duty to carry from the place of departure to that of destination is not absolute. In cases of property, the carrier's duty is absolute to receive it at the place of departure, and to deliver it at destination. In the case of passengers, the duty is simply to afford a sufficient time and opportunity to board or leave the vehicle. Passengers are presumed to be ready and willing to get on board at the place of departure, and to quit at the place of destination; and it is not the duty of the carrier to put them on or off, because, as rational beings, it is to be presumed that they will do what they expressly set out to do. A duty therefore devolves on the passenger; and it is to use reasonable care and diligence to board and leave the vehicle, and to avail himself of the opportunity afforded him by the carrier to do so.[1]

§ 299. FAILURE TO TAKE ON PASSENGER.

By the publication of notice to the public that he will stop his vessel at an appointed time and place, for the purpose of receiving passengers on board for transportation, a common carrier contracts an engagement with

§ 298. [1] Southern R. Co. v. Kendrick, 40 Miss. 374. See, also, ante, c. 4, as to the carrier's duty in receiving and discharging passengers. That chapter relates to personal injuries received by the passenger from the carrier's breach of duty, while the present chapter relates to the carrier's liability for failure to receive a passenger, or for failure to carry him to destination.

the public which his duty as common carrier binds him to perform; and for his failure to stop the vessel as advertised, without excuse, he will be liable in damages to a person who, on the faith of such notice, went to the wharf at the appointed time, and remained there during a cold and inclement night, waiting for the boat, and whose health was injured by reason of the exposure.[1] So, a custom of a railroad company to stop a train at a station on signal imposes the duty on the company to stop the train on its being signaled, and the duty on its servants operating the train to exercise care to observe the signals. A failure of its servants to perform such duty, where a ticket has been purchased on the faith that they will do so, creates as clear a liability as if the train had been advertised to stop at that station, and had not done so.[2] But where it is customary to start a stock train from any point in the company's yards, the company is not responsible to a drover for its failure to stop at the station, by rea-

§ 299. [1] Heirn v. McCaughan, 32 Miss. 17. A handbill posted up in the office of persons who sell tickets for passage on a certain steamer form no part of the contract of passage, in the absence of evidence that the persons selling the tickets, and who signed and displayed the handbills, were agents of the steamer. The mere fact that the tickets were recognized on board as genuine is not sufficient. Mills v. Shult, 2 E. D. Smith (N. Y.) 139. The time-table of a railway company, which on its face announces that it is for the government and information of employés only, and in terms reserves to the company the right to vary therefrom at pleasure, is not admissible in evidence in a suit for damages against the company for not stopping the train at a place mentioned in the time-table, but at which no station was ever really established. Beauchamp v. Railway Co., 56 Tex. 239.

[2] Illinois Cent. R. Co. v. Siddons, 53 Ill. App. 608.

son of which he was prevented from accompanying his stock.[3]

§ 300. FAILURE TO CARRY TO DESTINATION.

A railroad company which fails to deliver a passenger at the station to which it sells a ticket, either by stopping the train, or by returning the passenger thither, is liable in damages, unless it shows some controlling exigency which prevents such delivery.[1] It has been frequently held that a railroad company is liable for carrying a passenger past his destination without affording him an opportunity to get off.[2] Where a railroad company sells a ticket to a flag station, at which its trains do not stop unless signaled to do so for the purpose of receiving passengers, or unless there are on board passengers bound for such station, it is ordinarily the duty of the conductor, before reaching the station, to ascertain the destination of a passenger holding a ticket for that station, and to stop the train there to allow him to get off; and it is not ordinarily incumbent on the passenger to notify the conductor of his destination before being called on to exhibit his ticket.[3] It has even been held that a passenger who is carried two miles past his destination, and is there given the option to walk back, or ride on to the next station and back on another train free of

[3] Ohio & M. R. Co. v. Brown, 46 Ill. App. 137.

§ 300. [1] Samuels v. Railroad Co., 35 S. C. 493, 14 S. E. 943.

[2] Caldwell v. Railroad Co., 89 Ga. 550, 15 S. E. 678; Dave v. Steamship Co., 47 La. Ann. 576, 17 South. 128; Strange v. Railway Co., 61 Mo. App. 586.

[3] Chattanooga, R. & C. R. Co. v. Lyon, 89 Ga. 16, 15 S. E. 21

charge, has a right of action against the company, though he accepts the latter alternative, and is carried back free of charge, and though no bodily injury, mental suffering, insult, oppression, or pecuniary loss be shown. In such a case, however, he can recover only nominal damages.[4] So, a passenger on a freight train has the right to be discharged at the station platform, where that is the usual place adopted by the carrier for that purpose; and, if no opportunity is given him to alight there, and he is carried beyond his destination, and ejected a half a mile from the station, the carrier is liable.[5]

For the refusal of the proprietor of a steamboat to carry a passenger to the landing designated in his ticket, under the pretense that that landing place had been abandoned, and landing him instead at another landing on the opposite bank of the river from that to which it had agreed to carry him, an action lies, in which plaintiff is entitled to recover at least nominal damages.[6] So, where a passenger is received on a

[4] Thompson v. Railroad Co., 50 Miss. 315. Where a wreck necessitates a transfer of passengers, and one of them is by mistake left behind at the point of transfer, the company is liable in compensatory damages if the conductor failed to do all he might have done to insure the continuance of plaintiff's journey. Alabama & V. Ry. Co. v. Purnell, 69 Miss. 652, 13 South. 472.

[5] White Water R. Co. v. Butler, 112 Ind. 598, 14 N. E. 599. But under Code Miss. 1880, § 1054, which provides that, for injury to any passenger on any freight train not intended for passengers, the company shall not be liable except for gross negligence of its servants, gross negligence must be shown before a passenger riding on a freight train can recover for being carried past his destination. Perkins v. Railroad Co., 60 Miss. 726.

[6] Brulard v. The Alvin, 45 Fed. 766.

steamboat for a point known to be dangerous in effecting a landing, the danger will not excuse the boat and its officers for a failure to comply with the contract.[7]

Where a passenger enters a street car, on the assurance of the company's agent that the car will convey her to destination without change, a contract exists; and the passenger has a right of action for the company's failure to run the car through, and in compelling her to leave it, and walk several blocks, where another car was taken, which carried her to destination.[8]

Circumstances may, however, excuse the carrier's failure to give a passenger an opportunity to disembark at destination. Carrying a passenger three-quarters of a mile past a station platform is excused by proof that the snow was badly drifted at the station, of which the conductor had been notified, and against which he had been cautioned; that a freight train was following closely; that it was night; and that the conductor and engineer, exercising their best judgment, thought it safer and better to stop where they did than to stop at the station, where they were in danger of stalling the train in the snow.[9] So, one who purchases a ticket, with knowledge that the company has abandoned an old depot at his destination for a new one, half a mile away, can maintain no action against the company for failure to carry him to the old depot.[10]

[7] Porter v. The New England No. 2, 17 Mo. 290.

[8] Dillon v. Railway Co., 64 Mo. App. 418.

[9] Reed v. Railway Co., 100 Mich. 507, 59 N. W. 144.

[10] Martindale v. Railroad Co., 60 Mo. 508. A passenger who, through his own carelessness and inattention, neglects to change cars

§ 301. SAME—ANNOUNCING STATION.

No principle of law is better settled than that a railroad company carrying passengers, in order to afford them opportunity to leave the train at their places of destination, is bound to have the names of the different stations announced, upon the arrival of the trains, for a sufficient length of time to enable a passenger to get off with safety, and that a railroad company is liable for a loss or injury which may result to a passenger from a violation of this duty.[1] But it is not necessary to announce the names of intermediate stations for which there are no passengers. The officers of the train have a right to presume that the passenger will not leave the train until he reaches his destination. Nor is the company bound by the statements of passengers to a fellow passenger, erroneously informing

at a certain station, and is thence carried in the wrong direction, may be ejected from that train on his refusal to return to that station on another train, which would have carried him back in time to resume his journey without delay, and on his refusal to pay fare over the route on which he is actually traveling. Page v. Railroad Co., 6 Duer (N. Y.) 523.

§ 301. [1] Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 South. 360; Dorrah v. Railroad Co., 65 Miss. 14, 3 South. 36. This duty is required of railroad companies by statute in some of the states. Ky. St. 1894, § 784; 1 How. Ann. St. Mich. § 3417. The railroad company is not relieved from liability for carrying a passenger past his destination by the fact that, after the train had begun to slow up at the station where the passenger wished to get off, the conductor looked into the train, and failing to see the passenger, who had gone on the rear platform of the coach, signaled the train to go ahead, because he thought that the passenger had gotten off. Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 South. 360.

him of the name of the station at which the train has arrived.[2]

After properly announcing the name of a station, the carrier is not bound to go further, and give personal notice to a passenger traveling on an ordinary passenger train that his station has been reached. It is impracticable to require personal notice in these cases, because it would consume too much time on crowded trains, cause much detention in traveling, which would be a public inconvenience, and impose a duty on conductors, where there is a long train and many passengers, which it would require an extraordinary memory to perform properly.[3] Neither is a carrier liable for the failure of the conductor on an ordinary passenger train to waken a sleeping passenger at her destination,[4] though he had promised to do so. The carrier's duty is performed by publicly announcing the name of stations, and it is the passenger's duty to alight when the train comes to a stop.[5]

[2] Louisville, N. A. & C. Ry. Co. v. Cook, 12 Ind. App. 109, 38 N. E. 1104.

[3] Southern R. Co. v. Kendrick, 40 Miss. 374. This is true, even though the conductor has promised to specially notify a female passenger, and assist her from the train. St. Louis S. W. Ry. Co. v. McCullough (Tex. Civ. App.) 33 S. W. 285.

[4] Missouri, K. & T. Ry. Co. v. Perry, 8 Tex. Civ. App. 78, 27 S. W. 496; Texas & P. Ry. Co. v. Alexander (Tex. Civ. App.) 30 S. W. 1113. Where a sleeping passenger is carried past his destination, and endeavors to alight at a way station for which there are no other passengers, the company's employés owe him no duty until they have been notified of his intention to do so; and he cannot recover for injuries sustained by the starting of the train while alighting. Nichols v. Railway Co., 90 Mich. 203, 51 N. W. 364.

[5] Missouri, K. & T. Ry. Co. v. Kendrick (Tex. Civ. App.) 32 S. W.

But where a passenger retires for the night on a steamer or in a sleeping car a different rule prevails. The obligation to awaken and notify the passenger in time for him to prepare to safely and conveniently leave the train at the point of his destination is directly involved in the contract for the sale of a sleeping berth.[6] So, the owner of a Mississippi river steamer, the custom on which is to notify passengers when their landing places are reached, is liable for the negligence of its clerk in directing a female passenger, who has placed herself in his care, to disembark at night at the wrong landing.[7]

42; Nunn v. Railroad, 71 Ga. 710. Nor does the fact that the passenger was caring for a sick child alter the case, unless the conductor knew of it when he made the promise. Chicago, R. I. & T. R. Co. v. Boyles (Tex. Civ. App.) 33 S. W. 247. A railroad company is not responsible for carrying a seven year old boy past his destination, where the name of the station was called, and the boy was safely returned the same night. The fact that the conductor, on arrival of the train at the boy's destination, replied in the negative when the boy's father asked if he had a little boy on the train, does not make the company liable. Gage v. Railroad Co. (Miss.) 21 South. 657.

[6] Pullman Palace-Car Co. v. Smith, 79 Tex. 468, 14 S. W. 993. It is the duty of a railroad company, which sells a passenger a ticket on its line of road, and a sleeping-car ticket to an intermediate point, where the passenger is required to change cars, to awaken her a sufficient time before reaching such point to allow an opportunity to dress and prepare to make the change in a suitable and decent condition. McKeon v. Railway Co. (Wis.) 69 N. W. 175.

[7] Carson v. Leathers, 57 Miss. 650.

§ 302. REGULATIONS AS TO STOPPING PLACES FOR TRAINS.

The law seems to be well settled that, when a railroad company sells a ticket from one point to another on its own line, it simply engages to carry the passenger to his destination in the customary way, according to such reasonable rules and regulations as it has adopted for the running of its trains. In the absence of a special contract to that effect, a passenger has no right to require a train to stop at a particular station, where, according to the rules of the company, it is not scheduled to stop, and does not ordinarily stop. Railroad companies are bound, of course, to make reasonable running arrangements for the accommodation of the traveling public; but that does not mean that all passenger trains must stop at all stations, or that trains must be so scheduled and run as to enable each passenger to make a continuous trip. So long as a railroad company furnishes reasonable facilities for reaching all stations on its line, passengers who desire to reach a particular station should take trains that usually carry passengers to that place.[1] "To allow the caprice, or the wish, or even the seeming necessity, of an individual, to procure stoppage of trains at unaccustomed points, and to disarrange the schedule fixed for their predetermined and regular movement, would

§ 302. [1] Atchison, T. & S. F. R. Co. v. Cameron, 14 C. C. A. 358, 66 Fed. 709; Texas & P. Ry. Co. v. Ludlam, 6 C. C. A. 451, 57 Fed. 481; Plott v. Railway Co., 63 Wis. 511, 23 N. W. 412; Logan v. Railroad Co., 77 Mo. 663; Louisville & N. R. Co. v. Miles (Ky.) 37 S. W. 486.

be to permit, not only vast property interests, but human lives as well, to be certainly and recklessly put in peril." [2] The purchase of a ticket gives the passenger no right to be carried on the next passenger train leaving that station, if, according to the public running arrangements of the road, that train is not scheduled to stop at his destination, and there are other passenger trains, running at reasonable intervals, which do stop there.[3] The words on a railroad ticket, "Good on passenger trains only," do not impose any obligation on the company to carry the holder on a passenger train that does not, in accordance with the public running arrangements of the company, stop at the place named. These words are merely intended to prevent any implication that the company is bound to carry the holder on freight trains, or anything but passenger trains.[4] So the mere fact that a train is compelled to stop, and does stop, on a railroad crossing near a passenger's destination, does not give the passenger any right to go on a train which does not, ac-

[2] Wells v. Railroad Co., 67 Miss. 24, 6 South. 737.

[3] Pittsburgh, C. & St. L. Ry. Co. v. Nuzum, 50 Ind. 141; Plott v. Railway Co., 63 Wis. 511, 23 N. W. 412; Duling v. Railroad Co., 66 Md. 120, 6 Atl. 592. A passenger cannot complain of the failure of the company to stop the train at a point five miles from the destination mentioned in his ticket, where such point is not a regular station or stopping place for receiving or discharging passengers. Beauchamp v. Railroad Co., 56 Tex. 239. The refusal of a railroad company to designate, as a flag station for its through trains, a place which is not an incorporated town, which contains only a few houses, and is situated within three miles of a regular station, is not an unreasonable regulation. St. Louis, I. M. & S. Ry. Co. v. Adcock, 52 Ark. 406, 12 S. W. 874.

[4] Ohio & M. Ry. Co. v. Swarthout, 67 Ind. 567.

cording to its public running arrangements, stop at that station.[5] So, of course, a passenger who knows a train to be a special, going through to a certain station, has no right of action against the company for its refusal to stop the train at an intermediate station,—his destination.[6]

With respect to freight trains, the rule applies with still greater force. Freight trains do not generally transport passengers; and, when they do, it is by permission of the railroad's management, and, when the permission is granted, it may be done with any reasonable limitations the management may impose. A regulation forbidding the transportation of passengers on freight trains beyond a certain station is valid.[7]

But the power of a railroad company to make and enforce a regulation that one or more passenger trains on its road shall not stop at specified stations is subject to legislative control; and the railroad company is bound to observe a statute requiring all passenger trains to stop at places containing more than 3,000 inhabitants.[8]

[5] Pittsburgh, C., C. & St. L. Ry. Co. v. Lightcap, 7 Ind. App. 249, 34 N. E. 243.

[6] Missouri, K. & T. Ry. Co. v. Byas, 9 Tex. Civ. App. 572, 29 S. W. 1122.

[7] South & N. A. R. Co. v. Huffman, 76 Ala. 492.

[8] Pennsylvania Co. v. Wentz, 37 Ohio St. 333. A statute requiring trains to stop at junction points with other railroads can be invoked against the company only by passengers desiring to make the transfer to the other road, and not by a passenger whose destination is the junction point, and who takes a train not scheduled to stop there. Logan v. Railroad Co., 77 Mo. 663.

§ 303. SAME—PASSENGER'S DUTY TO KNOW REGULATIONS.

It is the duty of a passenger, before taking passage on a train, to ascertain whether it stops at his destination, according to the public running arrangements of the company.[1] Persons desiring tickets of travel are expected to inform themselves as to the train they wish to take, and must take, for their destination. If they do not understand or see the schedules or time-tables provided by the company, it is their duty in law to inquire and learn what train they should take to reach the point they wish; and if a mistake is made, not induced by the railroad company, against which ordinary diligence as to inquiry would have protected, no redress against the company will be accorded.[2]

§ 303. [1] Ohio & M. R. Co. v. Hatton, 60 Ind. 12; Ohio & M. Ry. Co. v. Applewhite, 52 Ind. 540; Pittsburgh, C., C. & St. L. Ry. Co. v. Lightcap, 7 Ind. App. 249, 34 N. E. 245; Dietrich v. Railroad Co., 71 Pa. St. 432; Caldwell v. Railroad Co., 8 Pa. Co. Ct. R. 467; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54; McRae v. Railroad Co., 88 N. C. 526; Noble v. Railroad Co. (Okl.) 46 Pac. 483.

[2] Duling v. Railroad Co., 66 Md. 120, 6 Atl. 592. A ticket is subject to the regulations of the company designating the passenger trains that are to stop at the station of destination, provided the passenger has notice of the schedule regulations, or such publicity has been given them in the ticket office of the company, and by posters in the cars, that a person of ordinary intelligence, by the use of reasonable care and caution, would or might obtain all requisite information as to the matters involved. Trotlinger v. Railroad Co., 11 Lea (Tenn.) 533.

§ 304. SAME—RIGHTS AND DUTIES OF PASSENGER ON WRONG TRAIN.

A passenger who gets on a train which he knows does not stop at the station named in his ticket has nevertheless the right to travel on that train and on that ticket to any intermediate station at which, by the regulations of the company, the train regularly stops. And the conductor, after being notified of the passenger's desire to get off at such intermediate station, has no right to eject him from the train.[1] It has even been held that such a passenger, who gets off at a preceding station, has the right to complete his journey by taking the next train which does stop at his station, without paying an extra fare.[2]

But the mere failure of the conductor to inform such a passenger, at the first opportunity, that the train

§ 304. [1] Richmond, F. & P. R. Co. v. Ashby, 79 Va. 130. In Baltimore & O. R. Co. v. Norris (Ind. App.) 46 N. E. 554, it was held that one who gets on a train without a ticket, and without knowledge that the train does not stop at the station to which he wishes to go, is entitled to remain on the train as a passenger, to the first regular stopping station, on paying his fare to that place. But in International & G. N. Ry. Co. v. Hassell, 62 Tex. 256, it was held that the company has the right to correct such a passenger's mistake at any regular stopping place of the train; and if, being informed of his mistake, after being afforded an opportunity to quit the train at a regular stopping station, and wait for the proper train, he refuses to do so, the conductor may put him off in a proper manner. The principle laid down in the Virginia case, as stated in the text, is, however, so clearly just that it would not seem to be open to dispute.

[2] Kellett v. Railroad Co., 22 Mo. App. 356. This decision, however, is questionable, because a passenger has no right to break his journey. See ante, § 291.

does not stop at his destination, so that he can exercise the right to leave at any station he chooses, before reaching his destination, is not a breach of the company's obligation, so as to render it liable for damages sustained by the passenger in consequence of his being put off at the station preceding his destination, where he was subjected to great inconvenience and exposure.[3] A passenger who holds a ticket for a station at which the train does not stop may be ejected at the preceding station, if he refuses to pay fare to the first succeeding station at which the train is scheduled to stop.[4]

§ 305. SAME—REPRESENTATIONS OF TICKET AGENT.

A railway passenger has the right to rely on a ticket agent's statement that a particular train will stop at his destination, where he has no information to the contrary.[1] The ticket agent is the proper person of

[3] Texas & P. Ry. Co. v. Ludlam, 6 C. C. A. 454, 57 Fed. 481; s. c. 2 C. C. A. 633, 52 Fed. 94. A passenger waives his right of action against a railroad company for its refusal to carry him to his destination, where, after being informed that the train will not go through to his destination, he leaves the car at a station a few miles from that point, and voluntarily receives back the fare for the incompleted portion of his journey. Florida South. R. Co. v. Katz, 23 Fla. 139, 1 South. 473.

[4] Logan v. Railroad Co., 77 Mo. 663; Fink v. Railroad Co., 4 Lans. (N. Y.) 147; Allen v. Railroad Co., 119 N. C. 710, 25 S. E. 787; Noble v. Railroad Co. (Okl.) 46 Pac. 483.

§ 305. [1] Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277, 11 N. W. 157; Central Railroad & Banking Co. v. Roberts, 91 Ga. 513, 18 S. E. 315; Pittsburgh, C. & St. L. Ry. Co. v. Nuzum, 50 Ind. 141; Alabama G. S. R. Co. v. Heddleston, 82 Ala. 218, 3 South. 53. But in

whom to inquire, when purchasing the ticket, as to the places at which the train will stop, and the ticket agent's representations are binding on the company. A passenger who purchases a ticket good on all trains, and who is informed by the station agent that a train he desires to take will stop at his destination, may recover damages from the railroad company for the conductor's refusal to carry him to that station, though, owing to the failure of the railway officials to inform the conductor of a change in the running arrangements, the conductor believes that his train is not authorized to stop at that station.[2]

But statements of a ticket agent that a certain train stops at a certain station will bind the railroad company only when made contemporaneously with the sale of a ticket, and not when made several weeks before, and not referred to at the time when the ticket was sold.[3]

So, an inquiry of a ticket agent when the next train is due, and the purchase of a ticket, do not amount to an agreement that the train will stop at the destination named in the ticket, at which the train is not scheduled to stop.[4] So, if an announcement is made by the con-

Pittsburgh, C. & St. L. Ry. Co. v. Nuzum, 60 Ind. 533, it was held that the ticket agent could not bind the company by such a statement.

[2] Sheets v. Railroad Co., 39 W. Va. 475, 20 S. E. 566. Where a passenger has been misdirected by a ticket agent, a petition in an action for carrying her past her destination should count on the negligent misdirection, and not on the act of the conductor in refusing to stop the train at her destination. Marshall v. Railway Co., 78 Mo. 610.

[3] Atchison, T. & S. F. R. Co. v. Cameron, 14 C. C. A. 358, 66 Fed. 709.

[4] Noble v. Railroad Co. (Okl.) 46 Pac. 483.

ductor during the journey that a change of cars is necessary, and the passenger hears it, he can no longer rely on the ticket agent's assurance that the train will carry him through without change of cars, but he must make further inquiry; and, if he fails to do so, he has no right of action against the company for not being carried to his destination.[5]

§ 306. SAME—WAIVER BY CONDUCTOR.

The conductor has no power to agree with a passenger to stop the train and let him off at a station at which it is not to stop by its public running arrangements. "The duty of a conductor is to run the train according to the public arrangements, and he has no power to change them; and a passenger has no right to infer that a conductor has any such power from his general duties as a conductor, and no reason to sup-

[5] Dye v. Railroad Co., 20 D. C. 63. A ticket agent pointed out a train to a passenger as one that would carry him to Lyons. That train, running 150 miles, deflected to a branch road not passing through Lyons, but was followed an hour afterwards by another train, which passed through Lyons. Held, that the passenger was in fault for being miscarried if, at or before reaching the point of divergence, the carrier used such means as would have conveyed to a traveler of ordinary intelligence, using reasonable care and attention, information of the necessity of his transferring himself to the second train. Barker v. Railroad Co., 24 N. Y. 599. A passenger who takes a train which, by the rules of the company, does not stop at her destination, has no right of action against the company for being set down at the nearest station to her destination where the train does stop, though she took the train under the direction of an agent of the company who had no authority to direct passengers. Sira v. Railroad Co., 115 Mo. 127, 21 S. W. 905.

pose that he could bind the railroad company by any such agreement." [1] A passenger who goes on a train, without a ticket, knowing that such train is not scheduled to stop at her destination, under an agreement with the conductor that he will violate the company's rules and stop at her destination, cannot maintain an action against the company for the conductor's violation of his agreement, in carrying her several miles beyond her destination, and there putting her off in the nighttime at a distance from any residence.[2] But if the conductor of a fast train receives fare from a passenger to a station at which such train is not scheduled to stop, it becomes his duty to notify the passenger that the train does not stop at that station, or to carry him to that station, and give him an opportunity to get off in safety.[3] So, where a passenger gets on a train at a junction point, and, before it starts, inquires of the conductor whether she is on the right train, it is his duty to inform himself of her destination, and it is no excuse for him to say that she did not show him the ticket, and that, therefore, he could not tell where she wanted to go when he directed her to remain on the train.[4]

But the act of a conductor in taking up and punching a passenger's ticket for a station at which the train is not scheduled to stop is not a waiver of the regulation, where he expressly informs the passenger that

§ 306. [1] Ohio & M. Ry. Co. v. Hatton, 60 Ind. 12.

[2] Alabama G. S. R. Co. v. Carmichael, 90 Ala. 19, 8 South. 87.

[3] McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631; s. c. 31 Ill. App. 100.

[4] International & G. N. Ry. Co. v. Gilbert, 64 Tex. 536.

the train will not stop there,[5] or that it is doubtful whether it will.[6]

§ 307. SAME—WAIVER BY CUSTOM.

A custom to stop a train at a station at which it is not scheduled to stop is a waiver of the regulation.[1] The frequent stopping of a train, by the conductor, at a place not a station, to receive and discharge passengers, must be deemed to have been done in the exercise of power conferred by the principal, so far as the traveling public is concerned, though in fact the principal may have forbidden the act. In such matters, the frequent exercise of power, which, from its nature, must have been known to the principal, may be regarded by persons dealing with the agent as sufficient evidence of the power which the agent assumes to exercise.[2] Proof that the train sometimes stops at a station at which it is not scheduled to stop places the burden on the company to show that such stops were exceptional and under special instructions.[3] So, though one knows that a certain fast passenger train, as a rule, does not stop at the station of his residence, yet, if there is a custom for such train to stop there for the accommodation of passengers holding tickets purchased from connecting railroads in other states, he may avail himself of this custom by purchasing

[5] Trotlinger v. Railroad Co., 11 Lea (Tenn.) 533.

[6] Chicago & A. R. Co. v. Randolph, 53 Ill. 511.

§ 307. [1] Texas & P. Ry. Co. v. Ludlam, 6 C. C. A. 454, 57 Fed. 491.

[2] Hull v. Railroad Co., 66 Tex. 619, 2 S. W. 831.

[3] Sira v. Railroad Co., 115 Mo. 127, 21 S. W. 905.

such a ticket in another state.[4] It has even been held that a passenger holding a ticket for a station at which the train is accustomed to stop may recover for being carried past his destination, though told by the conductor, when he took passage, that the train would not stop at that station on that trip.[5]

[4] Humphries v. Railroad Co., 70 Miss. 453, 12 South. 155. A custom of a railroad company to receive and discharge passengers at a certain platform in a town authorizes passengers for that town to presume that the railway company's contract of carriage is to deliver them at that point, though the platform may not be owned or constructed by the company. The customary use, and not the ownership, of it would be the controlling fact from which an implied contract to that effect is raised. Louisville & N. R. Co. v. Johnston, 79 Ala. 436.

[5] Chicago, R. I. & P. R. Co. v. Fisher, 66 Ill. 152. Where the custom of trains to stop at a station misleads a person, without fault on his part, into the belief that it is a flag station, and, relying on that custom, he purchases a round-trip ticket to that place from an agent of the railway company, who knows his intention to use it, in returning, on a train which does not stop at that point, and yet fails to inform him of that fact, the company will be liable for the failure of the train to stop when properly flagged. St. Louis, I. M. & S. Ry. Co. v. Adcock, 52 Ark. 406, 12 S. W. 874. A passenger cannot complain of a railroad company's refusal to put her off at a flag station short of her destination, although she had previously been permitted to get on and off at such station, there being no allegation that it was ever the custom of the company to so accommodate passengers. Matthews v. Railway Co., 38 S. C. 429, 17 S. E. 225. A custom obtaining among conductors not to stop a train at one of its scheduled stations is no defense to an action by a passenger for being carried past that station, if she had no knowledge of the custom. Louisville & N. R. Co. v. Cayce (Ky.) 34 S. W. 896.

§ 308. REGULATIONS RESTRICTING TICKETS TO PARTICULAR TRAINS.

A rule of a railroad company that a ticket, sold at less than full fare, shall not be good on its limited express trains, is reasonable and valid. Though not expressed on the ticket, it is the passenger's duty to ascertain whether his ticket entitles him to ride on that train; and, if he goes on the train without a proper ticket, the company has a right to eject him at a safe place, using no more force than necessary.[1] But in Massachusetts it has been held that, where a railroad company sells a ticket purporting to entitle the purchaser to passage on any of its regular trains, a rule of the company restricting the holder of such a ticket to a special class of trains does not justify his expulsion from a regular train, unless he had notice of the rule when he purchased the ticket.[2] The purchaser of a

§ 308. [1] Lake Shore & M. S. R. Co. v. Rosenzweig, 113 Pa. St. 519, 537, 6 Atl. 545; Dietrich v. Railroad Co., 71 Pa. St. 432. In the first case above cited, however, it was held that the passenger, ignorant of the rule, was not a trespasser whom the company could eject at a dangerous place, but only at a regular station or a dwelling house. A rule that a purchaser of an excursion ticket, sold at a reduced rate, shall travel on the train provided for that special purpose, and not upon a regular train, is a reasonable regulation. McRae v. Railroad Co., 88 N. C. 526.

[2] Maroney v. Railway Co., 106 Mass. 153. A railroad company which has chartered one of its trains for an excursion is liable for the act of its conductor and the person representing the charterer in ejecting from the car a person who had purchased a regular ticket entitling him to ride between the stations covered by the trip, and who entered the car in good faith, without notice of the fact that the train was a special one. Martin v. Railroad Co., 1 N. Y. St. Rep. 738.

first-class ticket is not entitled to be carried on a freight train, where the rules of the company require persons desiring to ride on freight trains to purchase tickets expressly for such trains. If the law required railroad companies to carry passengers on freight trains, then a different rule would apply; but, it being a matter of choice with them, they may impose reasonable terms, provided the rule is uniform.[3]

Such a regulation may, however, be waived by the conduct and the representations of the railroad employés. Thus, where a conductor of a freight train informs a passenger that he may change cars, and get on board of a fast express train, at an intermediate station, and assures him that the conductor's check in his possession will secure him transportation on that train, the company is liable for his ejection from the express train, though under the rules of the company the passenger was not entitled to ride on the express train.[4]

§ 309. RESTRICTION AS TO TRAIN IN TICKET.

A condition in a ticket that it shall not be good on specified trains is valid and binding on the purchaser, especially where it is sold at less than full fare.[1]

[3] Illinois Cent. R. Co. v. Nelson, 39 Ill. 110.

[4] Toledo, W. & W. Ry. Co. v. McDonough, 53 Ind. 289.

§ 309. [1] Wilson v. Railroad Co., 63 Miss. 352; Nolan v. Railroad Co., 41 N. Y. Super. Ct. 541. A condition on a mileage ticket that it shall not be good for passage on freight trains is not waived by a subsequent advertisement that passengers with tickets may ride on such trains, since the mileage ticket is not an ordinary ticket evidencing an unconditional contract for carriage. Dunlap v. Railroad Co., 35 Minn. 203, 28 N. W. 240.

Thus, a condition in a stock ticket, that it is good only on the freight train on which the stock is transported, is valid, and the ticket is not good for passage on a regular passenger train.[2]

But by issuing a round-trip excursion ticket, good on several specified trains, the company agrees to carry the passenger on any of these trains he may select; and where, on the return trip, the company puts him off at an intermediate station, owing to the dangerously crowded condition of the car, it must make compensation for any damages he has thereby sustained.[3] So, the fact that the train for which the ticket was issued was chartered by a third person, and that he broke his contract with the company, will not justify it in exacting an additional fare from the passenger, or in unreasonably delaying the transportation.[4]

Like all other conditions, a condition restricting the ticket to a particular train may be waived by the railroad company's employés. But a condition restricting a ticket to passage on a stock train is not waived by the fact that similar tickets had been previously received by defendant for passage on its passenger trains.[5] Nor does the acceptance of coupons for fare on a train for which the ticket is not good debar the company from enforcing the condition on a subsequent occasion.[6]

[2] Thorp v. Railroad Co., 61 Vt. 378, 17 Atl. 791.

[3] Great N. Ry. Co. v. Hawcroft (1852) 21 Law J. Q. B. 178.

[4] Eddy v. Harris, 78 Tex. 661, 15 S. W. 107.

[5] Thorp v. Railroad Co., 61 Vt. 378, 17 Atl. 791.

[6] New York & N. E. R. Co. v. Feely, 163 Mass. 205, 40 N. E. 20. The failure of a train of the first carrier, carrying second-class pas-

§ 310. RESTRICTION AS TO ROUTE.

Where a railroad company runs and operates two railroads between two points,—one a part of the through route, the other a longer, more circuitous, way route,—a passenger purchasing a through ticket is entitled to travel only over the usual, through, and most direct route; the company is not bound to carry him over the circuitous route. When, therefore, the passenger leaves the through train, and takes one passing over the way route, the company may demand pay for the additional mileage on the way route, and, on his refusal to pay it, he may be ejected.[1] The fact that a through passenger, when she boarded the train, was ignorant of a regulation requiring through passengers to take the direct route, and that no notice of any kind was given her until it was too late for her to take the direct route without turning back on her journey and losing time, does not entitle her to a passage on the circuitous route, and no action lies against the company for her ejection from a train on that route.[2] But in a recent Canadian case it was held that a condition in a railway ticket that the passenger shall travel "on a direct line" will be rejected as

sengers, to make connection with the proper train of a connecting road, does not impose any obligation on the connecting carrier to transport a passenger holding a second-class through ticket on its next train, a limited express,—upon which such tickets are not valid. New York, L. E. & W. Ry. Co. v. Bennett, 1 C. C. A. 544, 50 Fed. 196.

§ 310. [1] Bennett v. Railroad Co., 69 N. Y. 594, affirming 5 Hun, 599; Adwin v. Railroad Co., 60 Barb. (N. Y.) 590.

[2] Church v. Railway Co., 6 S. D. 235, 60 N. W. 854.

meaningless, where each of three possible routes is circuitous, though one is shorter in point of mileage than the others, and the passenger may make his journey on any one of the three roads.[3]

[3] Dancey v. Railroad Co., 19 Ont. App. 664, affirming 20 Ont. 603.

CHAPTER XXIV.

EJECTION.

§ 311. Right to Eject Passenger.
312. Refusal to Pay Fare, or to Exhibit or Surrender Ticket.
313. Same—Person Accompanying Passenger.
314. Same—Tender of Fare after Ejection Begun.
315. Same—Right to Resume Journey after Ejection.
316. Same—Loss of Ticket or Fare.
317. Same—Mistake as to Ticket or Fare.
318. Same—Demand of Excessive Fare.
319. Same—Mistake of Gateman.
320. Same—Mistake in Taking up Tickets.
321. Same—Mistake as to Time Limit.
322. Same—Mistake as to Trains.
323. Same—Mistake as to Round-Trip and Coupon Tickets.
324. Same—Mistake as to Street-Car Fares.
325. Same—Cases Holding Ticket Conclusive as between Conductor and Passenger.
326. Same—Right to Resist Wrongful Expulsion.
327. Disobedience of Rules.
328. Disorderly Conduct.
329. Same—Intoxicated Persons.
330. Same—Overt Acts.
331. Same—Statute Authorizing Ejection or Arrest.
332. Place of Ejection.
333. Same—Statutory Requirements.
334. Mode of Ejection.
335. Same—Resistance of Passenger.
336. Same—Orders and Threats.
337. Same—Province of Court and Jury.
338. Refunding Fare.
339. Duty of Ejected Passenger.

§ 311. RIGHT TO EJECT PASSENGER.

A carrier may eject a passenger from its vehicle—

1. **For refusal to pay fare, or to surrender or exhibit his ticket.**
2. **For a willful violation of its reasonable rules.**
3. **For disorderly conduct.**

The right to eject a passenger is a sort of police power, which the carrier must have a right to exercise in order to make its vehicles fit and safe places for the conveyance of passengers, as well as to secure to the carrier a suitable reward for its services. In many states this right has been secured to the carrier by express statute, but the power exists at common law, for the public good, and the carrier's protection.[1]

§ 312. REFUSAL TO PAY FARE, OR TO EXHIBIT OR SURRENDER TICKET.

A person on a railroad train, who has refused to pay his fare, is a trespasser, and may be ejected by the railroad company, by the use of all lawful and proper means.[1] So, a passenger without a ticket, who refuses

§ 311. [1] St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 352.

§ 312. [1] O'Brien v. Railroad Co., 15 Gray (Mass.) 20; Stone v. Railroad Co., 47 Iowa, 82; De Lucas v. Railroad Co., 38 La. Ann. 930; Shular v. Railway Co., 92 Mo. 339, 2 S. W. 310; Pickens v. Railroad Co., 104 N. C. 312, 10 S. E. 556; Clark v. Railroad Co., 91 N. C. 506; Railroad Co. v. Skillman, 39 Ohio St. 444. One who goes on a train, not with the intention to acquire a right to ride, but to compel the conductor to pass him on a void ticket, or to make a suit for damages, is not a passenger, but a trespasser, and may be ejected as such on his refusal to pay fare. Lillis v. Railway Co., 64 Mo.

to pay the higher train fare lawfully demanded by the conductor, may be ejected.[2]

A rule of a street-car company requiring passengers to deposit their fares upon entering the car is reasonable, and the refusal of a passenger to comply with the rule, after demand therefor, warrants the company in evicting him from the car, using no more force than is necessary for that purpose.[3]

A regulation of a railroad company requiring passengers to exhibit their tickets when requested so to do by the conductor, and directing the ejection from the cars of those refusing to do so, is reasonable and proper. The passenger is bound to conform to such regulation, and forfeits his right to be carried further by his refusal to comply with it. The fact that the passenger has once exhibited his ticket to the conductor does not excuse his failure to comply with another request for its exhibition, where the train has meantime passed a station.[4] But a passenger who has paid his

464. A passenger who is asleep when the train reaches his destination is not entitled to a free transportation to the next station; and, on his refusal to pay fare to that station, he may be ejected. Texas Pac. Ry. Co. v. James, 82 Tex. 306, 18 S. W. 589.

[2] Moore v. Railroad Co., 38 S. C. 1, 16 S. E. 781; Johnson v. Railroad Co., 14 N. Y. Wkly. Dig. 495. Under a by-law of a railway company which prohibits any passenger from entering a carriage without first having paid his fare and obtained a ticket, the company is justified in expelling a passenger who, with full knowledge of the by-law, goes on a train without first procuring a ticket. McCarthy v. Railway Co. (Ir. Exch.) 18 Wkly. Rep. 762.

[3] Nye v. Railroad Co., 97 Cal. 461, 32 Pac. 530; Com. v. McGlinn (Pa. C. P.) 29 Leg. Int. 124; Bachmann v. Railway Co. (Pa. C. P.) 32 Leg. Int. 179.

[4] Hibbard v. Railroad Co., 15 N. Y. 455. A passenger who refuses

fare to the conductor is not bound, on another demand for his ticket, made 10 minutes later, and on being accused by the conductor of lying, and with not having paid his fare, to produce the rebate check given to him by the conductor, in the absence of any request by the conductor for its production.[5]

The good faith or honesty of a passenger in believing that money in his possession is sufficient to pay his fare is immaterial in an action for his expulsion for his failure to tender an amount sufficient to pay it.[6] So the fact that a person attempting to ride on an expired railroad ticket believed in good faith that he had such right can in no way affect the right of the railroad company to eject him from the train.[7]

The right to eject a passenger for nonpayment of fare

to comply with a reasonable regulation of the company as to the surrender of tickets to the conductor may be ejected. People v. Caryl, 3 Parker, Cr. R. (N. Y.) 326. The fact that a passenger's baggage has been injured in transportation does not justify his refusal to yield up his ticket when demanded by the conductor, and on his refusal so to do he may be ejected. Havens v. Railroad Co., 28 Conn. 69.

[5] Louisville, N. A. & C. Ry. Co. v. Goben, 15 Ind. App. 123, 43 N. E. 890, and 42 N. E. 1116.

[6] Sage v. Railroad Co., 134 Ind. 100, 33 N. E. 771.

[7] Rudy v. Railway Co., 8 Utah, 165, 30 Pac. 366. One who goes on a railroad train with a ticket issued by a different company, and good to a different station than the one which is his destination, cannot ride without payment of fare, though he may have believed the ticket to be good when he boarded the train, and, on his refusal to pay fare, he may be ejected; and no damages can be recovered for injuries sustained in his forcible removal, when they were not willfully inflicted, when improper methods were not used, and when the wrongful resistance of such person directly contributed to the injuries. Atchison, T. & S. F. R. Co. v. Brown, 2 Kan. App. 604, 42 Pac. 588.

is conferred on railroad companies by statute in many of the states.[8] In Massachusetts it has been held that a statute which gives railroad companies a right to arrest persons riding on their trains with intent to evade payment of fare does not prohibit the expulsion of a passenger at a regular station for nonpayment of fare, without arresting him.[9]

§ 313. SAME—PERSON ACCOMPANYING PASSENGER.

Payment of his own fare by a parent will not entitle a child accompanying him to ride free, where, under the company's rules, a child of her age is required to pay half fare; and, whether the contract of carriage be considered as made with the child or with the parent, the child may be put off the train for nonpay-

[8] Mansf. Dig. Ark. § 5474; Civ. Code Cal. § 2188; Gen. St. Conn. 1888, § 3541; Comp. Laws Dak. 1887, § 3897; Rev. St. Fla. 1892, § 2267; Rev. St. Ill. c. 114, par. 94; Starr & C. Ann. St. p. 1944, par. 94; Rev. St. Ind. 1894, § 5181; Rev. St. 1881, § 3921; Rev. St. Me. 1883, p. 483, c. 51, § 78; 1 How. Ann. St. Mich. § 3370; Rev. St. Mo. 1889, § 2581; Civ. Code Mont. 1895, § 2898; Comp. Laws Neb. 1893, p. 310, § 107; Gen. St. Nev. 1885, § 883; Comp. Laws N. M. 1884, § 2665, subd. 13; Revision N. J. p. 932, § 113; Laws N. Y. 1850, c. 140, § 35; Code N. C. 1883, § 1962; Pub. St. R. I. p. 409, c. 158, § 32; 1 Rev. St. S. C. 1893, § 1732; 2 Comp. Laws Utah 1888, p. 32, § 2354; V. S. 1894, § 3915; Rev. St. Wis. § 1818; Sanb. & B. Ann. St. § 1818. A passenger who gets on a train without a ticket, and who, to the conductor's repeated demands for fare, says that he has not as yet made up his mind as to where he will go, and who puts off paying fare for that reason, is within the railway clauses act (14 & 15 Vict. c. 51, § 21, subsec. 6), which authorizes the ejection of passengers refusing to pay fare. Fulton v. Railway Co., 17 U. C. Q. B. 128.

[9] Beckwith v. Railroad Co., 143 Mass. 68, 8 N. E. 875.

ment of fare.[1] Where, in such a case, the parent prefers to get off with the child, rather than pay fare or ride on without her, the company is not responsible in damages.[2] It has even been held that a passenger on a railway train is responsible for the fare of a child under his charge, and, on refusal to pay the same, may, together with the child, be ejected from the train, although he paid his own fare. Under such circumstances the law implies an agreement on his part to pay the child's fare; and, if he refuses to pay it, the carrier has the right to put them both off,—the adult passenger because he has not complied with the contract on his part implied by law, and the child because the carrier is not required to carry it unless its fare is paid.[3] But if the conductor refuses to pass a child traveling on half-fare rate because he believes it to be over the limited age, and the mother also leaves the train, she may recover damages if the refusal be wrongful, though the conductor offers to pass her upon her own ticket without the child. It is unreasonable,

§ 313. [1] Beckwith v. Railroad Co., 143 Mass. 68, 8 N. E. 875.

[2] Pittsburgh, C. & St. L. Ry. Co. v. Dewin, 86 Ill. 296.

[3] Philadelphia, W. & B. R. Co. v. Hoeflich, 62 Md. 300. Plaintiff, who tendered fare for herself and two sisters, was informed by the conductor that the sum was not sufficient fare for three, and that one would have to get off. Plaintiff replied that she would get off with the others, whereupon the conductor handed her back the money, and all of them got off at the next station. Held, that plaintiff had no cause of action against the company, and the fact that other conductors had permitted plaintiff and her sisters to ride on the sum tendered does not render the act of the conductor in demanding the regular fare improper. Cox v. Terminal Railway, 109 Cal. 100, 41 Pac. 794.

in such a case, to ask a mother to leave her child.[4] So, if a conductor on a railway train finds a child sitting beside a female passenger, and knows that the father of the child is in the car, or could know on proper inquiry, he has no right to hold the female passenger responsible for the child's fare, and eject her for its nonpayment.[5]

§ 314. SAME—TENDER OF FARE AFTER EJECTION BEGUN.

A tender of fare after the train has been stopped, or is in process of being stopped, for the expulsion of a passenger, does not reimpose on the company the duty of carrying him.[1] Whenever a passenger refuses to accede to a just and lawful demand made upon him by the conductor for the payment of his fare, after being allowed reasonable time and opportunity to comply, he renounces his right to the position and privileges of a passenger, and subjects himself to expulsion from the train. If he changes his mind, and tenders the fare, before anything is done to bring the train to a stop in

[4] Gibson v. Railroad Co., 30 Fed. 904.

[5] Philadelphia, W. & B. R. Co. v. Hoellich, 62 Md. 300.

§ 314. [1] Hoffbauer v. Railroad Co., 52 Iowa, 342, 3 N. W. 121; Railroad Co. v. Skillman, 39 Ohio St. 444; People v. Jillson, 3 Parker, Cr. R. (N. Y.) 234; Pickens v. Railroad Co., 104 N. C. 312, 10 S. E. 556; Gould v. Railroad Co., 18 Fed. 155; Thomas v. Geldart, 20 N. B. 95; Louisville, N. & G. S. R. Co. v. Harris, 9 Lea (Tenn.) 180; Illinois Cent. R. Co. v. Bauer, 66 Ill. App. 124. A passenger who wrongfully refuses to pay the higher train fare demanded of him by the conductor cannot reinstate himself to the rights of a passenger by offering to pay the fare after the train has been stopped to eject him. Harrison v. Fink, 42 Fed. 787.

order to eject him, his refusal will be retracted in time, and his right to remain and be carried will remain unaffected. If he higgles and hesitates until he becomes a proper subject for ejection, and until steps have been taken for that end, he is too late. Any rule which would allow one passenger to play fast and loose with the conductor would allow all passengers to do so, and a train might thus be kept halting and alternating between running at ordinary speed and stopping throughout the whole journey; and to this embarrassment not only one train, but every train for the carriage of passengers, would be exposed.[2]

But where a train is stopped at a regular station, and before forcible ejection has begun, a passenger who has unlawfully refused to pay the fare demanded has the right to tender it; and if the conductor refuses it, and ejects him, the company is liable.[3] Where, however, the conductor has been compelled to resort to force to eject a passenger, he cannot make the expulsion illegal by offering to pay his fare during its process, even if it takes place at an ordinary stopping place of the train. Having invited an appeal to force, the passenger cannot, at his option, reserve the privilege of shielding himself from its application by invoking the protection of a contract, the implied conditions of which he has violated. The trial of his right in a manner which he has deliberately selected cannot be arrested by him, when its course is not pro-

[2] Georgia, S. & F. R. Co. v. Asmore, 88 Ga. 529, 15 S. E. 13, overruling South Carolina R. Co. v. Nix, 68 Ga. 572.

[3] O'Brien v. Railroad Co., 80 N. Y. 236.

ceeding to his satisfaction, so as to make its continuance by the other party unlawful.[4]

The rule does not apply where there is not a positive refusal to pay fare; as where the passenger pays the regular ticket fare and manifests an unwillingness to pay more, and good-humoredly tells the conductor that he will get off if the train is stopped.[5] So, where a passenger without money or a ticket gets on a train, believing in good faith that a tax certificate in his possession will be received in payment of fare, a tender made by another passenger as he is being ejected for nonpayment of fare should be accepted by the conductor, and the company will be liable for his ejection after such a tender.[6] So, where a passenger does not refuse to pay fare, but lacks a small sum, and tells the conductor that he can borrow it of a fellow passenger, and proceeds to make the effort, he is entitled to a reasonable time to do so.[7]

[4] Pease v. Railroad Co., 101 N. Y. 367, 5 N. E. 37, reversing 11 Daly (N. Y.) 350.

[5] Texas & P. R. Co. v. Bond, 62 Tex. 442.

[6] Louisville & N. R. Co. v. Garrett, 8 Lea (Tenn.) 438.

[7] Curl v. Railway Co., 63 Iowa, 417, 16 N. W. 69, and 19 N. W. 308. Where a passenger subject to deep sleeps or chronic drowsiness falls asleep soon after entering a train, and before his ticket is demanded, and recovers consciousness while being ejected by the conductor, it is the conductor's duty to accept the ticket if the passenger offers to produce it before reaching the car door; and, while the conductor was right in starting to eject him, he was wrong in completing it. Ferguson v. Railroad Co., 98 Mich. 533, 57 N. W. 801. Offer of a person, in company with plaintiff and others on a train, to pay fare for all of them, accompanied by his taking out his money, more than sufficient so to pay, all before the conductor ordered plaintiff off or made any attempt to stop the train, followed by refusal of the con-

§ 315. SAME—RIGHT TO RESUME JOURNEY AFTER EJECTION.

A passenger who, for nonpayment of his fare, has been ejected from a train at a place where there is no station, cannot, by climbing upon the train before it starts, and tendering the fare, obtain a right to be carried by it.[1] So, a passenger who has been rightfully ejected at an intermediate station for nonpayment of fare has no right to resume his journey on the same train, on tendering fare from the intermediate station, but must pay fare for the whole distance traveled.[2]

But where a passenger tenders a conductor a certain amount of fare to be carried to a certain station, which is less than the rate fixed by the company, saying that he will pay no more, and the conductor retains a sum sufficient to take the passenger to an intermediate station, and returns the balance, the passenger will have the right, on reaching such intermediate station, to pay the fare demanded from that point to the place of destination, and upon his offering to pay the same he cannot rightfully be put off the train.[3] So, where there is a dispute between the conductor

ductor to carry them, is a sufficient offer to make the expulsion wrongful. Baltimore & O. R. Co. v. Norris (Ind. App.) 46 N. E. 554.

§ 315. [1] O'Brien v. Railroad Co., 15 Gray (Mass.) 20; State v. Campbell, 32 N. J. Law, 309; North Chicago St. Ry. Co. v. Olds, 40 Ill. App. 421.

[2] Pennington v. Railroad Co., 62 Md. 95; Stone v. Railroad Co., 47 Iowa, 82; Swan v. Railroad, 132 Mass. 116; Nelson v. Railroad Co., 7 Hun (N. Y.) 140.

[3] Chicago, B. & Q. R. Co. v. Bryan, 90 Ill. 126.

and a passenger as to the station at which the passenger should change trains for his point of destination, and the passenger is ejected at the station which the conductor claims to be the proper place for that purpose, the passenger is not debarred from riding on that train on a tender of the proper fare.[4]

§ 316. SAME—LOSS OF TICKET OR FARE.

A passenger who has lost his ticket may be ejected on his refusal to pay fare. He, and not the company, is to blame for the loss. Besides, as a general rule, a railroad ticket is good in the hands of any person; and to deny to a railroad company the right to eject a passenger who has lost his ticket might result in compelling it to carry two passengers for a single fare.[1] So, the purchaser of a nontransferable commutation ticket, who has lost it, may be ejected on his refusal to pay fare.[2] The fact that a passenger loses or mislays his ticket after getting on the train, and that he exhibited it to a train hand before getting on board, gives him no right to ride without payment. From the very nature of things, there can be no distinction in the rights of a passenger, whether he loses or mislays his ticket before getting on the train or afterwards.[3] So, a passenger who surrenders his ticket or coupon to a conductor, and receives from him a

[4] Louisville & N. R. Co. v. Breckinridge (Ky.) 34 S. W. 702.

§ 316. [1] Ham v. Canal Co., 142 Pa. St. 617, 21 Atl. 1012. See, also, ante, § 279.

[2] Crawford v. Railroad Co., 26 Ohio St. 580; Downs v. Railroad Co., 36 Conn. 287; Cresson v. Railroad Co., 11 Phila. (Pa.) 597.

[3] Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128, 148.

check evidencing his right to ride, must produce it on demand by another conductor, who took charge of the train afterwards. If the check has been lost, the loss is the passenger's, and he must pay his fare, or leave the train, since it can be used by a third person, and the company might be thus defrauded.[4] So, a passenger who surrenders his ticket, and receives a check from the conductor, and then goes into another car, and fails to produce the check when the fare is again demanded, may be ejected, if he also refuses to go into the first car with the conductor for identification. The check, if given, was given him for the very purpose of identification. It was notice to him that the conductor would rely upon its production, and not on recollection.[5]

The rule in Canada is the same as in the United States.[6] But in England it has been held that a condition in a ticket requiring the passenger to show and

[4] Jerome v. Smith, 48 Vt. 230.

[5] Lucas v. Railroad Co., 98 Mich. 1, 56 N. W. 1039. A passenger who had lost his ticket entitling him to a seat in a drawing-room car applied to the ticket agent for another ticket. The agent declined to do so on the ground that the diagram showing the seats for which tickets had been issued was no longer in his possession, but the passenger was given a written statement that he was entitled to a seat. Held, that on presentation of the statement to the conductor, accompanied by a proper explanation, coupled with the fact that the diagram showed the sale of an unoccupied seat, it was the conductor's duty to permit the passenger to remain in the drawing-room car, and his exclusion therefrom, on refusal to pay an additional fare, was wrongful. Buck v. Webb, 58 Hun, 185, 11 N. Y. Supp. 617.

[6] Grand Trunk Ry. Co. v. Beaver, 22 Sup. Ct. Can. 498, reversing Beaver v. Railway Co., 20 Ont. App. 476; Curtis v. Railway Co., 12 U. C. C. P. 89.

deliver it up to any duly-authorized servant on demand, and requiring a passenger traveling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, to pay the fare from the station whence the train originally started to the end of his journey, does not authorize the company to remove by force a passenger who has bought a ticket, and accidentally lost it. He is rightfully on the train, and the only remedy that the company has for his breach of contract to show and deliver up the ticket is by a proceeding to recover the fare. "No one has a right to lay hands forcibly on a man, in the absence of some legal authority to do so, or some agreement to that effect." [7]

In all cases, however, a passenger who has lost his ticket or his fare is entitled to a reasonable time within which to search for it.[8] As a general rule, the time

[7] Butler v. Railway Co., 21 Q. B. Div. 207. Plaintiff took tickets for himself, his servants, and his horses, by a particular train on defendant's railway. The train was afterwards divided into two by defendant's servants. Plaintiff traveled on the first train, taking all the tickets with him. When the second train, with the servants and horses, was about to start, plaintiff's servants were required to produce their tickets, and, on being unable to do so, defendant refused to carry them. Held, that a by-law requiring passengers to procure tickets, and to show them and deliver them up when required, did not justify defendant's refusal to carry the servants, since it contracted with plaintiff, and delivered the tickets to him. Jennings v. Railway Co., L. R. 1 Q. B. 7.

[8] International & G. N. Ry. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 191; Louisville & N. R. Co. v. Maybin, 66 Miss. 83, 5 South. 401; Maples v. Railroad Co., 38 Conn. 557. Where the passenger finds his ticket after the conductor has signaled the train to stop, and offers it to the conductor, the latter has no right to eject. Hayes v. Railroad Co., 20 N. Y. Wkly. Dig. 237.

occupied by a passenger train in running from one station to another will be deemed reasonable; and, if the passenger fails to produce a ticket or his fare at the second station, he may be ejected.[9]

A passenger who drops his money in a street car is entitled to remain in the car a reasonable length of time to search for it, and the conductor has no right to eject him for nonpayment of fare, without allowing him to look for his money.[10] So, a conductor has no right to expel a passenger who has neither a ticket nor money with which to pay fare, but who informs the conductor that a friend in another car will pay his fare, without giving the passenger any opportunity whatever to get the money.[11]

§ 317. SAME—MISTAKE AS TO TICKET OR FARE.

There is an irreconcilable conflict of authority as to whether a passenger must submit to an ejection from the train, where he has paid his fare, but where, through some mistake of the carrier's servants, he has not received the proper evidence of payment. The correct rule, and the one supported by the great weight of recent authority, is that the ticket is not conclusive in dealings between passenger and conductor, and that the conductor has no higher right to expel a passenger than the company itself has.[1] In expelling a

9 Chicago & A. R. Co. v. Willard, 31 Ill. App. 435.

10 Hall v. Railway Co. (C. P. Phila.) 14 Wkly. Notes Cas. 242.

11 Clark v. Railroad Co., 91 N. C. 506.

§ 317. 1 St. Louis, A. & T. Ry. Co. v. Mackie, 71 Tex. 491, 9 S. W. 451; Texas & P. Ry. Co. v. Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400; Missouri Pac. Ry. Co. v. Martino, 2 Tex. Civ. App. 634, 18 S. W.

person from a vehicle, the carrier resorts to the right of self-help, and not to any legal remedy. It would therefore seem that the carrier acts at its peril whenever it takes the law into its own hands, and if it turns out that the person ejected was not a trespasser, but was lawfully on the train, that the carrier ought to respond in damages for the wrongful ejection. The general principle is that a person who has a right to go to any place without being regarded as a trespasser, and who does go there properly and lawfully, cannot be interrupted so long as he does not interfere with the right of anybody else, but simply pursues his own legal right; and any person who does interrupt him, treat him as a trespasser, and forcibly eject him as a trespasser, is liable in law for an action of assault and battery.[2]

This principle, that in such circumstances the ticket is not conclusive as between passenger and conductor, though denied by courts of high standing,[3] is supported by numerous recent cases. The supreme court of the United States has recently held that the conversation between a passenger purchasing a ticket and the ticket agent is admissible as to what the contract of carriage is.[4] So, a passenger who is wholly with-

1066, 21 S. W. 781; Gulf, C. & S. F. Ry. Co. v. Wright, 2 Tex. Civ. App. 463, 21 S. W. 399.

2 Watkins v. Railroad Co., 21 D. C. 1.

3 See post, § 325.

4 New York, L. E. & W. R. Co. v. Winter's Adm'r, 143 U. S. 60, 12 Sup. Ct. 356. In this case the facts were as follows: The ticket agent informed a passenger that he would be permitted to stop over at an intermediate station by the conductor. The conductor punched his ticket, and told him that was sufficient to give him the right to

out fault, and who has done all that can reasonably be required of him to do, and in whose ticket there is an error through the mistake, carelessness, or negligence of the agent or conductor of the railroad company, and who is ejected from the train on the ground that his ticket is defective, may recover for his ejection, and is not bound to pay another fare, and then sue the company to recover that.[5] So, a passenger who

stop over. On taking another train to complete his journey, the conductor refused his ticket, and demanded full fare, on the ground that he had no stop-over check, as required by the company's rules. Held, that the passenger was rightfully on the train, that the conductor had no right to expel him, and that he had the right to make a sufficient resistance to denote that he was being removed by compulsion and against his will. In Yorton v. Railway Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401, the facts were as follows: A conductor made a mistake in a stop-over check which he handed to a passenger, and the conductor of another train refused to honor it, and requested the passenger either to pay fare or get off the train. The passenger chose the latter alternative, and was put off at a station, without force. It was held that plaintiff had the right to elect to pay fare or leave the train; and, choosing the latter alternative, he had the right to recover all such damages as were the direct and natural result of the wrongful act complained of. It was further held that plaintiff was not obliged to pay the fare demanded, and complete his journey on the second train, for the purpose of mitigating damages. But see Id., 54 Wis. 234, 11 N. W. 482, where a contrary conclusion was apparently reached.

[5] Northern Pac. R. Co. v. Pauson, 17 C. C. A. 287, 70 Fed. 585; Calloway v. Mellett, 15 Ind. App. 366, 44 N. E. 198. A passenger on a steamer holding a ticket entitling him to first-class accommodations is under no obligation, when the validity of his ticket is denied by the purser, to pay another first-class fare, and then sue the steamboat company to recover it; but has a right to insist on the accommodations which his ticket entitles him to, and, on being denied them, may sue the company in tort for its refusal to perform its duty. The Willamette Valley, 71 Fed. 712. The berth check issued to a passenger by

calls for and pays for a ticket to a specified place, but who, by mistake of the company's agent, is given a ticket different from that desired, with which he, without fault, boards the train, believing he has the proper ticket, is entitled to ride thereon the distance for which he has paid, upon making proper explanation; and, if the conductor refuses to heed his statements, the company must respond. He has paid for his ride, and presented in good faith the only evidence given him by the company of his right to make the journey. If the company has not furnished him the proper token to convey the fact to the mind of its conductor, the blame and the consequences thereof must rest upon it, being in fault, rather than upon the passenger, who is not.[6] So, a passenger who enters into a contract with a station agent for a first-class passage, and who pays the full price for a first-class ticket, but to whom the agent by mistake delivers a second-class ticket, which the passenger does not examine, need not pay the conductor an additional fare to secure the right to ride in a first-class car, though a rule of the company makes the ticket conclusive as between the conductor and passenger. If the passenger refusing to pay the additional fare demanded is compelled to ride in a second-class car, he may recover damages thereby sustained.[7] So where a passenger presents a valid

the conductor of a sleeping car is not conclusive as to what berth the passenger actually bargained for, and parol evidence is admissible to show what berth the passenger bought. Mann Boudoir Car Co. v. Dupre, 4 C. C. A. 540, 54 Fed. 646.

[6] Evansville & T. H. R. Co. v. Cates, 11 Ind. App. 172, 11 N. E. 712.

[7] St. Louis, A. & T. Ry. Co. v. Mackie, 71 Tex. 491, 9 S. W. 451. A mistake of the ticket agent in issuing a ticket on a route not entitled

ticket, though in a mutilated form, the conductor is bound to receive it, unless its condition is due to the fault of the passenger, and the conductor, in the exer-

to be taken by the passenger is the mistake of the corporation, and the conductor can no more deny the passenger the benefit of the contract as really made than could the carrier itself. Gulf, C. & S. F. Ry. Co. v. Rather, 3 Tex. Civ. App. 72, 21 S. W. 951. Where a passenger, in the hurry of embarking, does not notice a mistake in the ticket, caused by the fault of the ticket agent, the question of his negligence in not discovering the mistake is for the jury. Id. A railway company is liable for ejecting a passenger who is rightfully on a train, and has paid his fare, though the ejection is the result of the honest belief of the conductor that he has not paid, and the passenger makes no effort to show that he has paid, and though the mistake is immediately discovered by the conductor, and the passenger is taken back on the train before it has left the station where he was ejected. Gulf, C. & S. F. Ry. Co. v. Barnett (Tex. Civ. App.) 34 S. W. 449. If a passenger has once paid his fare, he cannot be ejected because he refuses to pay a second time; and, if he is so ejected, the company will be liable to him in damages; and it will be no defense, in an action against the company for a wrongful expulsion, that its conductor was honestly mistaken. Gorman v. Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112. A passenger who has a right to ride on a train, but whose ticket, through a mistake of the railroad company's employés, does not evidence the right, need not pay an additional fare, and sue for the return thereof, as money paid under duress. He may insist on his rights, and, if ejected from the train, may sue the company for wrongful ejection. Cherry v. Railroad Co., 52 Mo. App. 499. One who calls for a ticket between two named points on a railroad, pays therefor, and receives from the agent a ticket which is of a complicated character, and not easily understood by persons unfamiliar with its use, is not chargeable with the agent's mistake in giving him a wrong ticket, and may recover from the company for his expulsion from the train. Georgia R. Co. v. Olds, 77 Ga. 673. A person who calls for a ticket good to a particular station, and pays the price demanded therefor, has a right to rely on the agent of the company to give him the proper ticket, and, no peculiar circumstances intervening, there is no duty on the person purchasing to examine the same; and any mistake which may occur, as to the point of destination, is chargeable to the

cise of reasonable care, becomes satisfied that it is not valid.[8]

In some of the cases stress is laid on the fact that the passenger inquired of the ticket agent or conductor as to the validity of the ticket, and that he was assured that it was good.[9] Thus, where a ticket is

railway company, and not to the person receiving or purchasing the ticket. Georgia Railroad & Banking Co. v. Dougherty, 84 Ga. 741, 12 S. E. 747. Where a coupon ticket on its face contains everything necessary to entitle a passenger to ride to his destination, the fact that the check mark was torn off does not justify the company in refusing to accept the ticket, since the passenger is not in fault as to this. Ohio & M. Ry. Co. v. Cope, 36 Ill. App. 97. The wrongful ejection of a passenger from a car is actionable, though unaccompanied by physical force or violence, or any rude or ungentlemanly words or acts on the part of the conductor, who acts in perfect good faith, because, owing to a mistake of another of defendant's employés, there is an error in the passenger's ticket. Willson v. Railroad Co., 5 Wash. 621, 32 Pac. 468, and 34 Pac. 146. If a railroad company issues a proper ticket, and the conductor compels the holder to get off, he is entitled to damages; and this, though it was through an honest mistake of another of the company's servants. Baltimore & O. R. Co. v. Bambrey (Pa. Sup.) 16 Atl. 67. In an action for a wrongful expulsion, based on the passenger's refusal to pay additional fare demanded of him by the conductor, who believed that his ticket was good only to an intermediate station, the fact that the conductor advised plaintiff to pay fare, and settle the matter with the agent who sold the ticket, and that there was a doubt as to whether the ticket was really good for the whole distance, cannot mitigate the damages. The passenger, having paid his fare, was as much entitled to stand on his rights as the company, believing the fare not to have been paid, was to stand on its; and whether he should stay on the train, or refuse to pay and suffer expulsion, was a matter which the law left solely to the passenger's discretion. Lake Erie & W. R. Co. v. Arnold, 8 Ind. App. 297, 34 N. E. 742.

[8] Houston & T. C. R. Co. v. Crowe (Tex. Civ. App.) 37 S. W. 1071.

[9] Murdock v. Railroad Co., 137 Mass. 293; Gulf, C. & S. F. Ry. Co. v. Halbrook (Tex. Civ. App.) 33 S. W. 1028; Hardy v. Railroad Co.,

purchased in perfect good faith, and the ticket agent informs the passenger that it is a good ticket, the fact that there is a punch-mark thereon, indicating to the conductor that it has been canceled, does not affect the passenger's right to travel thereon, and he cannot be ejected for a refusal to pay his fare a second time.[10]

In all cases, however, where there is a mistake in the ticket, it is the passenger's duty to make an explanation to the conductor. While a passenger's ticket is not in all cases conclusive evidence of his contract with the carrier, yet it is sufficient evidence of the contract to justify a conductor (an agent of the railway company other than the one with whom the contract was made) in acting upon it, as showing the actual contract, in the absence of any explanation by the passenger that, through fraud, mistake, or inadvertence, it does not show the real contract. Hence a passenger who calls for a first-class ticket, but who receives a second-class ticket through the mistake of the ticket agent, cannot recover for his ejection from the first-class car by the conductor, in the absence of any explanation or statement that a mistake had been made.[11]

58 Hun, 607, 12 N. Y. Supp. 55. Where a passenger, whose destination necessitates a change of trains, is unable to obtain a ticket at the station, and pays his fare to the conductor, who neglects to give him a ticket, the rule that a passenger must show his ticket or pay his fare will not authorize his ejection, if the conductor of that train is informed by the first conductor of the payment of fare. Homiston v. Railroad Co., 3 Misc. Rep. 342, 22 N. Y. Supp. 738.

10 Hufford v. Railroad Co., 64 Mich. 631, 31 N. W. 544. But see s. c. 53 Mich. 118, 18 N. W. 580.

11 Alabama & V. Ry. Co. v. Drummond (Miss.) 20 South. 7.

§ 318. SAME—DEMAND OF EXCESSIVE FARE.

When a passenger endeavors to buy a ticket before entering the cars, and is unable to do so on account of the fault of the corporation or its agents or servants, and he offers to pay the ticket rate on the train, and refuses to pay the car rate, it is unlawful for the corporation, or its agents or servants, to eject him from the train. He is entitled to travel at the lower rate, and the corporation is a trespasser, and liable for the consequences, if he is ejected from the train by its agents or servants. The passenger may, under such circumstances, either pay, under protest, the excess demanded, or refuse to pay it, and hold the corporation responsible in damages if he is ejected from the train.[1] In such a case the conductor is bound to know whether or not the passenger's failure to get a ticket is owing to the fault of the ticket agent.[2] A passenger who tenders the legal fare, and is put off the train because he will not pay an excessive fare demanded, may recover the damages suffered by reason of the ejection. He is not bound to pay the excessive fare, with a right to sue for the excess.[3]

§ 318. 1 Forsee v. Railroad Co., 63 Miss. 66; Gulf, C. & S. F. Ry. Co. v. Sparger (Tex. Civ. App.) 39 S. W. 1001.

2 Georgia, S. & F. R. Co. v. Asmore, 88 Ga. 529, 15 S. E. 13.

3 Chamberlain v. Railway Co. (Mich.) 68 N. W. 423. In this case, the court distinguished cases where the passenger was seeking to travel without having a ticket indicating his right to passage and without offering to pay his fare. "The case at issue is entirely different from any of them. Here the defendant was exacting an illegal fare,—something it had no right to do. The plaintiff was seeking to have transportation as a passenger, and was willing to pay the

§ 319. SAME—MISTAKE OF GATEMAN.

Where a passenger presents himself at a depot gate in time to take a train, the company is responsible for the act of its gateman in refusing him permission to pass, under the mistaken belief that he is too late.[1] So, it is liable for the gateman's act, in forcibly preventing a passenger from getting on the train, on the ground that his ticket is defaced, where it is in the same condition as it was when purchased, though the rule would be otherwise if it had become defaced by the passenger's fault.[2] So, where a passenger is prevented from taking a train by the gatekeeper, owing to the failure of the proper officers to notify him that persons having tickets like plaintiff's were entitled to go on the train, the fact that the gatekeeper was acting in accordance with his instructions does not relieve the company from liability for the assault.[3]

§ 320. SAME—MISTAKE IN TAKING UP TICKETS.

Where a conductor takes a ticket from a passenger which entitles him to passage from one station to another, and between these points demands of him another fare for part of the trip, and ejects him from the car for failure to pay it, such acts constitute a legal wrong for which the passenger is entitled to recover

legal fare therefor. Upon the tender of the legal fare, he had a right to be carried to his destination." Id.

§ 319. [1] Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052.

[2] Northern Cent. Ry. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449.

[3] Watkins v. Railroad Co., 21 D. C. 1.

damages.[1] So, in such a case, a second conductor has no legal right to expel the passenger because he does not pay fare, or produce the ticket, although a rule of the company may require expulsion under such circumstances. The law is of higher authority than the rule.[2]

§ 321. SAME—MISTAKE AS TO TIME LIMIT.

Where there is a mistake on the face of a mileage ticket as to the year of its issuance, but there has been an attempt to rectify the error by an interlineation as to the date of its expiration, an action will lie against the company for the ejection of the passenger during the year for which the ticket was in fact issued, though a rule of the company requires conductors and ticket collectors to refuse mutilated tickets.[1] So, if the time limit on the ticket is unreasonably short, and the passenger explains the facts to the conductor, showing that the time limit is unreasonable, it is equivalent to an explanation made to the company, and the com-

§ 320. [1] St. Louis, I. M. & S. Ry. Co. v. Davis, 56 Ark. 51, 19 S. W. 107.

[2] East Tennessee, V. & G. Ry. Co. v. King, 88 Ga. 113, 14 S. E. 708.

§ 321. [1] Trice v. Railway Co., 40 W. Va. 271, 21 S. E. 1022. In this case it was said: "That [the rule against mutilated tickets] is good between company and collector; but can it destroy the right of a passenger under a ticket which in fact has not been mutilated or changed? Suppose the collector should find marks of mutilation or alteration when a court should find none. Would the rights of a party be defeated in a court by the decision of the collector? The rule is prudent; but if an instance of its application is one of mistake or error, and thereby one guilty of no fraud is injured, the company, like others, must answer for the consequences of its action or the mistake of its agent, though apparently well meant."

pany can no more justify the conduct of the conductor in exacting an additional fare than it could a like exaction directly made by it. If, in such case, the passenger should be right, the carrier cannot exact the performance of conditions contrary to the rights of the passenger under the contract. It assumes the responsibility of any wrong it or its servants may commit under the circumstances.[2] So, where the purchaser of a round-trip ticket asked for a return transportation good for 30 days, and the ticket agent agreed to give him such a ticket, a time limit of 10 days on the ticket is not controlling, and the company is liable for the ejection of the passenger on his return trip, begun after the expiration of 10 days, but before the

[2] Gulf, C. & S. F. Ry. Co. v. Wright, 2 Tex. Civ. App. 463, 21 S. W. 399. A passenger purchased a ticket for an extended journey, which, by mistake of the ticket agent, was so punched as to indicate that it expired on the day of issue. One conductor telegraphed for instructions, and received an order to honor the ticket until further instructions. At the end of his division he handed her the telegram; but the conductor of the next division refused to honor the ticket, though the telegram was shown him, and he worried her for several hours, and finally put her off at an intermediate station at midnight. Another passenger then paid her fare, and she resumed her journey. Held, that plaintiff had a right of action for the expulsion and ill treatment. Johnson v. Railway Co., 46 Fed. 347. But in Gulf, C. & S. F. Ry. Co. v. Daniels (Tex. Civ. App.) 29 S. W. 426, it was held that a ticket purchased with knowledge of a time limit expressed on its face cannot be varied by parol evidence of the declarations of the ticket agent that it will be good for the day after the time limited, there being neither negligence nor fraud on the part of the agent. The ticket purchased with knowledge of its provisions constitutes the contract between the parties, and the rule excluding parol evidence to vary a written contract applies.

expiration of 30.[3] So, a passenger who has been given an expired ticket by mistake of the ticket agent may maintain an action of tort against the railway company for his ejection from the train by the conductor, though the latter acted in good faith, and pursuant to instructions.[4]

§ 322. SAME—MISTAKE AS TO TRAINS.

A passenger who, by mistake of a ticket agent, gets on a train not scheduled to stop at his destination, and who is ejected by the conductor before reaching his destination, may recover against the company as for a tort, and not merely for a breach of contract, though the conductor, in making the ejection, enforced the reasonable rules of the company.[1]

[3] Gulf, C. & S. F. Ry. Co. v. Halbrook (Tex. Civ. App.) 33 S. W. 1028.

[4] Louisville & N. R. Co. v. Gaines (Ky.) 36 S. W. 174.

§ 322. [1] Pittsburgh, C., C. & St. L. Ry. Co. v. Reynolds (Ohio Sup.) 45 N. E. 712; Chicago, B. & Q. R. Co. v. Spirk (Neb.) 70 N. W. 926. In the case first cited, the supreme court of Ohio said: "As between the conductor and the company, the latter may have no right to complain of him. He violated no duty he owed to the company. He simply obeyed his instructions as received from the company applicable to such a case. Therefore it may well be said that, as between him and the company, the conduct of the conductor was rightful. But, as between the company and the passenger, the question is wholly a different one. When a company, by the act of a proper agent, causes a passenger, as in this case, to take the wrong train,—one that does not stop at his station,—it must be held to have contemplated that, under the instruction given the conductor, the passenger would have to be put off the train as soon as the error should be discovered by the conductor, unless he should, as demanded, pay additional fare, and be carried beyond his station. The act of the first agent of the

But, as we have seen, a person has no right on a train which, under the rules of the company, does not stop at the station for which he has purchased a ticket, provided he has not been misled by any of the company's agents, and hence he may be ejected therefrom

company, misdirecting the passenger, is the wrongful act for which the first company becomes liable in tort; and the act of the conductor in ejecting him is a consequence of the first wrongful act,—is the proximate cause of the passenger being ejected; and, as against the passenger, the act of the conductor in ejecting him, being the act of the company, is wrongful. The fallacy, as before stated, arises out of the mistaken assumption that the act of the conductor is rightful as against the passenger. This can in no instance be the case where the company is responsible for the mistake of the passenger in taking the wrong train. All the cases cited in support of the contention of the plaintiff in error that in any way do so are based on the fallacy that the conductor had the right to eject the passenger, when, as a matter of law, the real question is whether the act of the company done by its agent is rightful as against the ejected party. The question may be simplified by eliminating the fact of agency in each instance; that is, by supposing that the common carrier in each instance acts for himself or itself. Here no mind would doubt but that the carrier, having instructed the passenger to take one of his trains, with knowledge of his destination, would be a wrongdoer should he, on discovering his mistake, eject him from the train, on the ground that he has taken the wrong train. But the intervention of an agent, by whom the act is done in each instance, does not change the case; for each act of the agent done in the scope of his agency must be imputed to the principal,—is in law the act of the principal. * * * The general principle derived from the cases is that where, by the fault of an agent of the company, a passenger takes the wrong train, or is without a ticket, or one imperfectly or erroneously stamped, or for any similar reason, and is ejected by the conductor of the train, in pursuance of the rules of the company, it is liable to him as for tort. The rule concedes to the company the right to make reasonable rules for the conduct of its business, and to require their enforcement by its agents. The contingency that in certain cases the company will be made liable by the act of its conductor in following its rules, where

without the use of unnecessary violence.[2] So the fact that a rule of a railroad company, forbidding passengers from riding on through freight trains, has often been violated, does not deprive the company of the right to begin its enforcement whenever it may deem it proper to do so; and one who boards a freight train, which has no appearance of being held out for the accommodation of passengers, may be ejected from it by the conductor.[3]

§ 323. SAME—MISTAKE AS TO ROUND-TRIP AND COUPON TICKETS.

Where one purchases a round-trip ticket, and the outgoing conductor, by mistake, takes up the wrong end of it, the passenger is nevertheless entitled to

the appearances on which he acted were created by the fault of another agent, of which he had no knowledge, is a risk incident to the privilege of making rules; and it should suffer from the fault of the agent that caused the mistake, rather than an innocent person."

[2] Chicago, St. L. & P. R. Co. v. Bills, 104 Ind. 13, 3 N. E. 611; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54; Caldwell v. Railroad Co., 8 Pa. Co. Ct. R. 467; Missouri, K. & T. Ry. Co. v. Dawson (Tex. Civ. App.) 29 S. W. 1105. See, also, ante, § 302 et seq. This is the rule in Michigan, even though the passenger was misled by the ticket agent. Lake Shore & M. S. Ry. Co. v. Pierce, 47 Mich. 277, 11 N. W. 157.

[3] Hobbs v. Railway Co., 49 Ark. 357, 5 S. W. 586. Where a conductor of a freight train informs a passenger that he cannot carry him beyond a station 10 miles short of his destination, and offers to stop the train and let him get off, the refusal of the passenger to get off amounts to an election to be carried to the station named by the conductor, and the taking and canceling of the passenger's ticket, under these circumstances, does not take away the conductor's right to eject him when the station named is reached. South & N. A. R. Co. v. Huffman, 76 Ala. 492.

transportation on the ticket left in his hands. If the return conductor refuses to accept this, and, ignoring explanation, ejects him for want of a proper ticket, the railroad company is liable therefor in damages. The holder of the ticket, under such circumstances, giving a reasonable explanation of the mistake, is entitled to be carried according to the real contract; and any regulation of the carrier making the ticket the only evidence, and authorizing the conductor to disregard such explanation, is unreasonable, and will not justify expelling the passenger.[1] So, a condition in a round-trip ticket, consisting of two parts, with a puncture mark between them, "Not good if detached," will not justify the expulsion of a passenger on the going trip, on the ground that the two portions of the ticket had been broken apart, where the passenger exhibits both parts to the conductor, and it appears that they were separated through no fault of the passenger.[2] Where a round-trip ticket contains

§ 323. [1] Kansas City, M. & B. R. Co. v. Riley, 68 Miss. 765, 9 South. 443; Philadelphia, W. & B. R. Co. v. Rice, 64 Md. 63, 21 Atl. 97. The mere fact that a return coupon has become soiled and changed in color does not justify the conductor in ejecting the passenger, without affording him an opportunity to make an explanation showing the ticket to be genuine, where all the printing and the stamp of the company are plainly visible on the ticket. Chicago & E. I. R. Co. v. Conley, 6 Ind. App. 9, 32 N. E. 96, 865.

[2] Wightman v. Railway Co., 73 Wis. 169, 40 N. W. 689. A railroad ticket was issued in coupons, good over two sections of defendant's railroad, with a right to stop over. The conductor on the first train detached both coupons, and gave the passenger a conductor's check as evidence of his right to ride on the second section. The conductor on the second train declined to honor the check, and demanded fare. Held that, though under the rules of the company the check was not

a provision requiring the passenger to present it to the agent at destination for identification and stamping, and the passenger does so present it, and the agent takes the ticket and returns it folded to the passenger, without any objection as to the sufficiency of the identification, and under such circumstances as to lead the passenger to believe it has been stamped, the conductor acts at his peril in expelling the passenger because the ticket has not been stamped, after the passenger has fully explained the situation to him; and for such ejection the passenger is entitled to recover damages, though he immediately afterwards reentered the train, paid another fare, and continued his journey.[3]

§ 324. SAME—MISTAKE AS TO STREET-CAR FARES.

A passenger on a street car, who has paid his fare, entitling him to complete his journey on a connecting car, may maintain an action against the company for his ejection from that car because the conductor of

good, and though the first conductor had no right to detach both coupons, yet the passenger was not bound to make inquiries as to the extent of the conductor's authority, and that he had a right to refuse payment of fare, and recover for his ejection from the train, which ensued on such refusal. Palmer v. Railroad Co., 3 S. C. 580.

[3] Northern Pac. R. Co. v. Pauson, 17 C. C. A. 287, 70 Fed. 585; Missouri Pac. Ry. Co. v. Martino, 2 Tex. Civ. App. 634, 18 S. W. 1056, 21 S. W. 781. Where a coupon ticket good over two lines is presented to the conductor of the first line, and he by mistake retains the coupon good over the second line, and returns the other coupon to the passenger, the passenger may maintain an action against the first carrier for her expulsion from the cars of the second carrier, which declined to receive the coupon good over the road of the first carrier. Louisville, N. A. & C. R. Co. v. Conrad, 4 Ind. App. 83, 30 N. E. 406.

the first car had failed to give him a transfer check, or had given him a mutilated or defaced check. In such a case, though the passenger can present no proper evidence of his right to ride, and though it may have been the duty of the conductor towards the carrier to eject the passenger, yet the carrier is responsible. By its previous neglect of duty towards the passenger it has justified him in assuming that he has a right to continue his journey on a car from which the conductor, in accordance with the carrier's regulations, should expel him.[1] So a street-railway company is

§ 324. [1] Appleby v. Railway Co., 54 Minn. 169, 55 N. W. 1117. Where a conductor on a street car by mistake gives a passenger a transfer check which appears on its face to have expired by limitation, and this fact is not known to the passenger, the company is liable for his ejection by the conductor of the connecting car. Muckle v. Railway Co., 79 Hun, 32, 29 N. Y. Supp. 732. A street-car transfer check, issued to a passenger at 9 a. m., and good for the connecting car for 10 minutes after being punched, had both the hours of 9 a. m. and 7:30 a. m. punched. The passenger boarded a connecting car two or three minutes after 9 a. m., but the conductor of that car refused to receive the check, on the ground that it was two hours old, and, on the passenger's refusal to pay fare, ejected him, though the conductor's attention was called to the 9 o'clock punch, and though assured that it had been issued at 9. Held, that the ejection was wrongful, and that, assuming that the double punching created a doubt in the conductor's mind, he had no right, in the circumstances, to resolve that doubt against plaintiff. Laird v. Traction Co., 166 Pa. St. 4, 31 Atl. 51. A street-car company which has adopted a system of permitting passengers to change cars without transfer checks must give the public a reasonable notice of a regulation requiring transfer checks as an evidence of the passenger's right to ride on the connecting car; and a passenger who, on the day after the change of rules has been made, gets on the connecting car without notice of the change, cannot be ejected for his failure to procure a transfer check. Consolidated Traction Co. v. Taborn (N. J. Sup.) 32 Atl. 685. Where,

liable in damages for the ejection of a passenger, where it appears that the passenger had dropped his fare in the box in obedience to the printed rule of the company, and had no knowledge of private directions given to the driver to go through the cars when crowded, and collect the fare.[2] So, where a driver authorized to make change on behalf of the company delivers to a passenger a package in which there is a shortage of five cents, to which his attention is immediately called, the passenger must be regarded as having paid his fare of five cents, and the driver has no right to thereafter eject him for his failure to put an additional fare in the box, although a rule of the company requiring passengers to put their fares in the box is reasonable, and a passenger may ordinarily be ejected from the car upon his refusal to comply with the rule.[3] A

on presentation of a coupon ticket, good over two connecting street-railway lines, the conductor negligently tears it so as to include about one-third of the coupon of the connecting road as well as that of his own, and hands the mutilated fragment to the passenger, the conductor of the second line is bound to know that the fragment is a portion of a genuine ticket used on his line, which, if whole, would have entitled the passenger to a ride on his line, and he has no right to eject the passenger for nonpayment of fare. Bowser v. Railway Co., 97 Mich. 565, 56 N. W. 937. But a conductor of a street car has the right to eject a passenger who offers a transfer check, not merely torn, but torn in two pieces, where it appears that there is a custom of passengers to whom transfer checks have been issued, but who do not care to use them, to tear them in pieces, and throw them away, near the point where plaintiff boarded the car from which he was ejected. Woods v. Railway Co., 48 Mo. App. 125.

[2] Perry v. Railway, 153 Pa. St. 236, 25 Atl. 772.

[3] Curtis v. Railway Co., 94 Ky. 573, 23 S. W. 363. A rule of a street-railway company imposing an extra charge for each package "too large to be carried on the lap of the passenger without incommod-

passenger ejected from a street car for an alleged failure to pay his fare, under the definite charge of the conductor that he is attempting to beat his way over the road, is not required to use another street-car ticket, in his possession, to avoid expulsion, in order to reduce the damages as much as possible.[4]

§ 325. SAME—CASES HOLDING TICKET CONCLUSIVE AS BETWEEN CONDUCTOR AND PASSENGER.

A number of cases decided by courts of high standing are squarely in conflict with the views expressed in the preceding sections. These cases all proceed on the principle that, as between conductor and passenger, the ticket is conclusive evidence of the passenger's right to travel; and that if, through the mistake of any of the carrier's servants, he cannot produce the proper ticket, he may be expelled from the car. In such a case it is held that he cannot recover damages for the ejection, but only for the breach of contract, which are generally limited to his additional expenses in reaching destination. The reason for this rule is stated to be the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collect-

ing others," is reasonable; but the determination of a conductor that two picture frames 2 feet long and 20 inches wide are within the rule is not conclusive on the passenger, and, in an action for his ejection because of his refusal to pay the extra charge, the question is one of fact for the jury. Morris v. Railroad Co., 116 N. Y. 552, 22 N. E. 1097.

[4] Sprenger v. Traction Co., 15 Wash. 660, 47 Pac. 17.

ing its fares. The conductor cannot decide from the statement of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. To do so would take more time than a conductor can spare in the proper and safe discharge of his manifold duties, and it would render the company constantly subject to fraud and consequent loss. The passenger must submit to the inconvenience either of paying his fare or of being ejected, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent.[1]

Thus, where a ticket agent, by mistake or fraudulent design, sells to a passenger a ticket which shows on its face that it is expired and worthless, the passenger cannot maintain an action of trespass against the company for his expulsion by the conductor, who refused to accept the ticket. In such a case there can be no recovery for the ejection, but only for money expended in reaching destination.[2] So, a passenger who informs the conductor of his desire to stop over at an intermediate station must see that he receives a proper token giving him the right to stop over, in addition to the verbal assurance of the conductor; and where the check given him by the conductor states that it is "good for this day and train only," his re-

§ 325. [1] Poulin v. Railway Co., 52 Fed. 197; Frederick v. Railroad Co., 37 Mich. 342; Hufford v. Railway Co., 53 Mich. 118, 18 N. W. 580; McKay v. Railroad Co., 34 W. Va. 65, 11 S. E. 737; Western Maryland R. Co. v. Stocksdale, 83 Md. 245, 34 Atl. 880; Bradshaw v. Railroad Co., 135 Mass. 407.

[2] Baggett v. Railroad Co., 3 App. D. C. 522; Hall v. Railroad Co., 15 Fed. 57; Id., 9 Fed. 585; Pennsylvania Co. v. Hine, 11 Ohio St. 276; Crawford v. Railroad Co., 26 Ohio St. 580.

course against the company, if any, is for breach of the contract. He cannot resist expulsion, and then sue for damages thereby sustained, where no more force than necessary to accomplish the result was used.[3] The fact that a conductor of a train has failed to give a passenger a check when taking up his ticket does not entitle the passenger to complete his journey on a connecting train; and, if he is ejected from that train for refusal to pay fare, his recovery is limited to the value of the ticket of which he was wrongfully deprived by the first conductor, it appearing that he had the money with which to pay his fare, and afterwards paid it, and completed his journey on a later train.[4]

[3] Peabody v. Navigation Co., 21 Or. 121, 26 Pac. 1053.

[4] Van Dusen v. Railway Co., 97 Mich. 439, 56 N. W. 848. See, also, to same effect, Mahoney v. Railway Co., 93 Mich. 612, 53 N. W. 793; Townsend v. Railroad Co., 56 N. Y. 295, reversing 4 Hun, 217. Though a conductor has by mistake taken up the return coupon of a round-trip ticket, the company is not liable for the ejection of the passenger on the return trip by a conductor who refuses to accept the going coupon, if the passenger, before entering the returning train, could, by using ordinary diligence, have discovered the mistake of the first conductor. Wiggins v. King, 91 Hun, 340, 36 N. Y. Supp. 768. Where a nontransferable 1,000 mile commutation ticket is issued to "Mr. E. Bannerman," the conductor is justified in refusing to let a woman ride on the ticket, though her name is also E. Bannerman, and though her husband, who purchased it, informed the conductor that it was purchased for her. Chicago & N. W. Ry. Co. v. Bannerman, 15 Ill. App. 100. Where a second-class ticket, good only on a particular train, contains a provision that "no agent or employé has power to modify the contract," no assurance of the baggage master or ticket agent that it may be used on a limited train carrying only first-class passengers can confer any right of transportation not conferred by the ticket itself. New York, L. E. & W. Ry. Co. v. Bennett, 1 C. C. A. 544, 50 Fed. 496. A passenger who pays for three tickets,—for him-

§ 326. SAME—RIGHT TO RESIST WRONGFUL EXPULSION.

On the question of the passenger's right to resist a wrongful expulsion from the train for his failure to produce a proper ticket or other evidence of a right to ride, the courts have divided on the same lines as on the ques-

self and two others,—but who by mistake of the ticket agent receives only two, must pay his fare to the conductor on demand, and may be expelled for his refusal so to do. Weaver v. Railroad Co., 3 Thomp. & C. (N. Y.) 270. A passenger who had mileage taken out of his book by the conductor for his entire trip changed seats at an intermediate station. The conductor failed to recognize him, and demanded fare. He simply said that he had paid his fare, and, on being asked where to, said: "You ought to know where I paid my fare to. It is your business to know." The conductor thereupon ejected him, but after he was off the car the conductor recognized him, and asked him to get on again. This the passenger refused to do, with the statement: "I will fix you." Held, that the passenger having failed to produce his mileage book, or to give his name to the conductor, or to explain how or when he had paid his fare, could not recover for the ejection, since such an explanation would have avoided the mistake. White v. Railroad Co. (Mich.) 65 N. W. 521. Where a passenger on a street car receives, without reading it, a wrong transfer check, and the conductor of the second car declines to receive it in payment of fare, the passenger, after having refused to pay fare to the second conductor, and been by him expelled from the car, cannot maintain an action against the corporation for his expulsion. "It is no great hardship upon the passenger to put him upon the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check." Bradshaw v. Railroad Co., 135 Mass. 407. A passenger was sold an excursion ticket by the agent of a railroad company, which, by its terms, was required to be stamped for return passage by the secretary of a camp-meeting association. The camp meeting had closed, and the secretary had gone away. The passenger tendered the unstamped ticket for return passage, and, on the refusal of the conductor to accept it, refused to pay fare. Held,

tion of the conclusiveness of the passenger's ticket as between himself and the conductor. It is believed that the weight of authority and of reason is in favor of the proposition that a passenger lawfully on the train, and having a right to be carried, has the right to make a reasonable resistance to an effort to eject him, though through some mistake of the company's servants he has not the proper ticket; and for injuries sustained in consequence of such resistance the company is liable.[1] Thus, a passenger purchasing a

that he was rightfully ejected, and could not recover therefor. Western Maryland R. Co. v. Stocksdale, 83 Md. 245, 34 Atl. 880, distinguishing cases where tickets are apparently good on their face, and the passenger has no notice of any defects, from those where the ticket on its face is obviously not good, and is notice to plaintiff that it does not entitle him to passage. Where, owing to a defect in a round-trip ticket, the agent at destination refuses to stamp it on the offer of the holder to identify himself as the purchaser, it is the duty of the latter to purchase another ticket; and if he fails to do so, and is ejected, he cannot recover damages for humiliation and mental anguish suffered by reason of the ejection, but only the expense of the delay and the price paid by him for another ticket. Russell v. Railway Co. (Tex. Civ. App.) 35 S. W. 724.

§ 326. [1] Louisville, N. A. & C. Ry. Co. v. Wolfe, 128 Ind. 347, 27 N. E. 606; Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381; Cleveland, C., C. & St. L. Ry. Co. v. Beckett, 11 Ind. App. 547, 39 N. E. 429; Denver Tramway Co. v. Reed, 4 Colo. App. 500, 36 Pac. 557; Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, 14 C. C. A. 612, 67 Fed. 662, affirming 6 C. C. A. 597, 57 Fed. 822; Dancey v. Railroad Co., 19 Ont. App. 664. In this last case it is said: "I do not find that our courts have yet gone so far as to hold that a passenger rightfully traveling on his ticket is bound to leave the train at the conductor's order, at the peril of not being able to recover damages for an assault committed in expelling him by force. He is in the right, and the company is in the wrong. 'No one has the right to lay hands forcibly on a man, in the absence of some legal authority to do so,' and here there was none. Pushed to its legitimate conclusion, the argument must be that no damages what-

ticket good for the day on which it is sold, but by mistake bearing an earlier date, is not obliged, on demand of the conductor, to leave the train which he took on the day of sale, and sue the company for breach of the contract to carry, but he has a right to resist ejection, and recover damages therefor.[2] So, a passenger lawfully on a train, who has paid the lawful fare to the conductor, has the right to offer such resistance to any attempt on the part of the conductor to remove him therefrom as may be necessary to prevent his being ejected; and if, in consequence of such resistance, extraordinary force is necessary and is used to remove him, and he is injured thereby, he may recover for such injury.[3]

ever can be recovered for any assault under such circumstances as the plaintiff brings it upon himself by disobeying an order which, though unlawful, he cannot effectually resist; and, if the argument is valid in the case of the railway passenger, I do not see why it should not hold good in the case of any one else who stands in danger of an assault for noncompliance with an unlawful order which superior strength stands ready to enforce."

2 Ellsworth v. Railway Co. (Iowa) 63 N. W. 584.

3 English v. Canal Co., 66 N. Y. 454; Zagelmeyer v. Railroad Co., 102 Mich. 214, 60 N. W. 436. In English v. Canal Co. it was said: "Where a conductor is in the wrong, the passenger has a right to protect himself against any attempt to remove him, and resistance can lawfully be made to such an extent as may be essential to maintain such a right. Cases occur where circumstances may imperatively require that the passenger should remain on the train on account of others who may be in his charge, or where it is indispensable that he should hasten on his journey without delay; and if, by reason of the willfulness or mistaken judgment of the conductor, he could be expelled when lawfully there, serious injury might follow. The law does not, under such circumstances, place the passenger within the power of the conductor, and, when lawfully in the cars, he is authorized to vindicate

On the other hand, there are cases that have been decided on a squarely conflicting principle. "Whenever there is a reasonable ground to dispute the right of the passenger to ride on the ticket he has, it is the duty of the passenger to pay the additional fare demanded by the conductor, if able to do so, and rely on the remedy to recover the amount before a justice of the peace or other competent court; and damages cannot be increased by an obstinate resistance to the demands of the conductor, and by forcing him to expel the passenger from the train. The passenger can take that course undoubtedly, and sue for damages for a breach of the contract, or of the public duty of the carrier; but his own unreasonable conduct in resisting a fairly reasonable demand of the conductor can be taken by the jury as mitigation of damages, and will reduce them to nominal or actual damages sustained by the delay." [4] Thus it has been held that the fact that a conductor fails to give a passenger a check, or any other evidence of the right to ride on a train, on taking up his ticket, does not justify the passenger in resisting by force an ejection by another conductor, who demands payment of fare or presentation of evidence of a right to ride, as required by the rules of the company.[5] So, it has been held to be

such right to the full extent which might be required for his protection."

[4] Gibson v. Railroad Co., 30 Fed. 904. To same effect, Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499; Chicago, B. & Q. R. Co. v. Wilson, 23 Ill. App. 63; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54.

[5] Townsend v. Railroad Co., 56 N. Y. 295.

the duty of a passenger to pay an excessive fare when demanded, rather than invite an expulsion from the train by refusing to comply with the conductor's demand.[6]

§ 327. DISOBEDIENCE OF RULES.

Willful disobedience of the carrier's rules by a passenger will justify the carrier in refusing to transport him further, but not in maltreating him while continuing to perform the contract for his conveyance.[1] Where a passenger takes a dog with him into the passenger car, contrary to the rules of the railroad company, and refuses to remove him to the baggage car when requested, the conductor is justified in removing both from the car in a proper manner, though the passenger has paid his fare.[2] But spitting on the floor by a passenger at a station is no ground for expelling him from the waiting room, unless he had knowledge of a rule forbidding it.[3] So, the fact that

[6] Atchison, T. & S. F. R. Co. v. Hogue, 50 Kan. 40, 31 Pac. 698.

§ 327. [1] Hanson v. Railway Co., 62 Me. 84.

[2] Gregory v. Railway Co. (Iowa) 69 N. W. 532.

[3] People v. McKay, 46 Mich. 439, 9 N. W. 486. A person intending to take passage on a train has the right to go upon the carrier's premises, within a reasonable time before the expected departure of the train on which he intends to go, and to remain there until the departure of such train; but he has not the right to enter and remain on such premises after having been requested to leave by the corporation, unless he is then intending to go upon the train; and the corporation has a right to remove him if, after such request, he refuses to depart. Harris v. Stevens, 31 Vt. 79; Johnson v. Railroad Co., 51 Iowa, 25, 50 N. W. 543. A woman of ill repute, who had on a prior occasion conducted herself in an indecent manner at a passenger station, can recover nominal damages, at most, for her removal from the station in the

a passenger, who has paid his fare, boards the train or conveyance in a manner forbidden by the carrier's rules, does not authorize his ejection, after he has safely gotten on board, since his presence on the conveyance is rightful, no matter what the irregularity in getting there.[4]

A passenger on a street car has no right to ride on the platform, in violation of a rule of the company, when there is room inside; and the conductor, after he has requested the passenger to come inside, may eject him from the car for his refusal so to do.[5] And a passenger who occupies two seats in a car, in violation of a rule of the railroad company restricting him to one, and who displays a pistol when the conductor attempts to remove his baggage from one of them, may be ejected from the train, though he has not interfered with other passengers in occupying two seats.[6]

evening, several hours prior to the departure of the train on which she said she was about to travel, where no force whatever was used, and she simply obeyed an order to leave. Beeson v. Railway Co., 62 Iowa, 173, 17 N. W. 448.

[4] Smith v. Railway Co. (Com. Pl.) 18 N. Y. Supp. 759, affirmed 138 N. Y. 623, 33 N. E. 1083; Huerstel v. Railroad Co., 1 City Ct. R. (N. Y.) 134; Compton v. Van Volkenburgh, 34 N. J. Law, 134.

[5] McMillan v. Railway Co., 172 Pa. St. 523, 33 Atl. 561; Ft. Clark St. R. R. v. Ebaugh, 49 Ill. App. 582. The mere fact that a passenger on a street car, after being informed that it is against the rules to smoke on the car, proceeds to fill his pipe, does not authorize his ejection, where he does not light it. Denver Tramway Co. v. Reed, 4 Colo. App. 500, 36 Pac. 557. A passenger may be ejected for persisting in talking with the driver, in violation of the company's rules. Com. v. Mansfield (Pa. Com. Pl.) 29 Leg. Int. 124.

[6] Gulf, C. & S. F. Ry. Co. v. Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009.

§ 328. DISORDERLY CONDUCT.

The use of indecent or profane language in a public conveyance will authorize the ejection of the passenger using it. When indecent or profane language is being used on a car, it is the conductor's duty to check it, and he will be guilty of a breach of duty if he fails to do so. And if, in a car filled with passengers, nearly one-half of whom are women, a man in earnest conversation undertakes to emphasize his statement, as some men are apt to do, by saying, "By God," it is so, or "By God," it is not so, the law makes it the duty of the conductor to check him; and if the latter denies his guilt, and, upon being assured by the conductor that he was guilty, flies into a passion, and calls the conductor a "damned liar," he may be rightfully removed from the car; not as a punishment for his insult to the conductor as an individual, but to vindicate the authority of the law, which forbids the use of such language in a car, or any other public place where women and children have a right to be.[1] But it has been held that mere use of indecent and vulgar language is no ground for ejecting a passen-

§ 328. [1] Robinson v. Railway, 87 Me. 387, 32 Atl. 991. A passenger who, without reasonable provocation, willfully and in anger calls the conductor a liar in the presence and hearing of other passengers, is guilty of disorderly conduct, and may be ejected. Eads v. Railway Co., 43 Mo. App. 536. The exaction of a trifling sum as fare, which had already been paid, does not justify the use of grossly profane and obscene language by a passenger in the presence of female passengers; and the conductor may rightfully expel him from the car. Chicago, B. & Q. R. Co. v. Grillin, 68 Ill. 499. See, also, People v. Caryl, 3 Parker, Cr. R. (N. Y.) 326.

ger, unless in a voice sufficiently loud to attract the attention of other passengers, and to annoy and disturb them.[2]

A father is not responsible for the acts of an adult son, with whom he is traveling; and, if the son be guilty of misconduct justifying his expulsion from the train, this will not justify the conductor in ordering the father to leave, or in ejecting him.[3]

§ 329. SAME—INTOXICATED PERSONS.

When the conduct of a passenger on a railroad train is such as to alarm or insult the other passengers, interfere with the management of the train, or endanger the safety of passengers or those in the charge of the train, it is not only the right, but the duty, of the conductor to eject him, and the company is not liable for any injury that may result, provided no more force is used than is reasonably necessary; and this rule applies to an intoxicated passenger, although he may not be able to take care of himself, and although

[2] Chicago City Ry. Co. v. Pelletier, 134 Ill. 120, 24 N. E. 770; Id., 33 Ill. App. 455. The fact that a passenger, in the heat of passion, produced by an accusation of the conductor that he has not paid his fare, uses oil scene and profane language in the presence of ladies, does not constitute a ground for ejecting him. The wrong committed by the passenger was provoked by the conductor, and the company cannot avail itself of that wrong as a defense for his ejection. Louisville, N. A. & C. Ry. Co. v. Wolfe, 128 Ind. 347, 27 N. E. 606. A passenger who is a stranger waiting at a depot for a train between 1 and 4 a. m., and who, after failing to find the gentlemen's water-closet outside the main depot building, impelled by necessity, has resort to the water-closet intended and designated for ladies only, is not guilty of disorderly conduct. King v. Railroad Co., 69 Miss. 245, 10 South. 42.

[3] Louisville & N. R. Co. v. Maylin, 66 Miss. 83, 5 South. 401.

he was known to be intoxicated when received as a passenger.[1] So, a passenger suffering from delirium tremens, whose conduct occasions serious annoyance and discomfort to his fellow passengers, may be removed.[2] The fact that on removing an intoxicated passenger from a passenger coach the train hands, as an act of kindness, place him in a baggage car, in which he, without objection, rides to his destination, gives him no right of action against the company.[3] So, the mere fact that a passenger was known to be intoxicated when he entered the car does not preclude the conductor from afterwards expelling him, when his conduct becomes disorderly.[4]

But a rule of a railroad company forbidding the transportation of intoxicated or filthy persons does not justify the ejection of a passenger afflicted with St. Vitus' dance, which produced involuntary motions somewhat resembling the movements of an intoxicated person. The carrier judges at its peril as to the application of such a rule in a given case, and, if it errs, it is answerable for its mistake, or that of its servant, acting under its authority.[5]

§ 329. [1] Louisville & N. R. Co. v. Logan, 88 Ky. 232, 10 S. W. 655. A passenger who gets on a train, drunk, and advises other passengers not to pay their fare, is guilty of disorderly conduct, and may be ejected. Baltimore, P. & C. R. Co. v. McDonald, 68 Ind. 316. A carrier may expel a passenger who is drunk, and demeans himself so as to interfere with the comfort of the other passengers. Edgerly v. Railroad Co. (N. H.) 36 Atl. 558. See, also, ante, § 112.

[2] Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877.

[3] Sullivan v. Railroad Co., 118 Mass. 119, 18 N. E. 678.

[4] Louisville & N. R. Co. v. Logan, 88 Ky. 232, 10 S. W. 655.

[5] Regner v. Railroad Co., 74 Hun, 202, 26 N. Y. Supp. 625.

§ 330. SAME—OVERT ACTS.

A conductor is not bound to wait until some overt act of violence, profaneness, or other misconduct has been committed by an intoxicated passenger, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender; but he may do so whenever acts of impropriety, rudeness, indecency, or disturbance appear either inevitable or probable.[1]

§ 331. SAME—STATUTE AUTHORIZING EJECTION OR ARREST.

In many states, statutes exist authorizing the ejection of passengers for disorderly conduct.[1] In still others, conductors are vested with power to arrest disorderly passengers.[2] It has been held that the pow-

§ 330. [1] Vinton v. Railroad Co., 11 Allen (Mass.) 304; Lemont v. Railroad Co., 1 Mackey (D. C.) 180.

§ 331. [1] Code Ala. § 1156; Rev. St. Ill. c. 114, par. 94; 2 Starr & C. Ann. St. p. 1944, par. 94; Rev. St. Ind. 1894, § 5182 (Rev. St. Ind. 1881, § 3922); Ky. St. 1894, § 806; Ann. Code Miss. 1890, § 3563; Comp. Laws N. M. 1884, § 2665, subd. 13; Rev. St. Ohio 1890, § 3434; 1 Rev. St. S. C. 1893, § 1718. Ann. Code Miss. 1890, § 4313, empowers station agents to preserve order, and, if necessary, eject any person whose conduct is boisterous and offensive.

[2] Rev. St. Ind. 1894, §§ 1771, 5183, 5184 (Rev. St. Ind. 1881, §§ 1702, 3923, 3924); Gen. St. Kan. 1889, pars. 2378, 2379; Rev. St. Me. 1883, p. 482, c. 51, §§ 73, 74; Rev. St. Mo. 1889, §§ 3830, 3831; Pub. St. N. H. 1891, p. 453, § 8; Rev. St. Ohio 1890, § 3433; Code W. Va. 1891, p. 907, § 31; Sanb. & B. Ann. St. Wis. §§ 1817a, 4598a. Laws N. Y. 1863, c. 346, authorizes railroad and steamboat companies to employ policemen for duty at stations. Laws N. Y. 1880, c. 223, authorizes the governor to appoint all or any conductors and brakemen on trains police officers, with the usual power of such officers.

er to arrest, conferred by statute, was intended to confer additional powers on railroad officials, and not to take away their common-law right to remove a passenger who is noisy and disorderly, to the annoyance of the other passengers.[3] In the absence of such a statute, it has even been held that, where a number of passengers on a train are guilty of disorderly conduct and a continuous breach of the peace, and the conductor is unable to expel them from the train by reason of their superior physical force, he has a right to cause their arrest by a police officer, without a warrant, as soon as the train arrives at a station. The fact that they were guilty merely of a misdemeanor, and that no warrant was procured for their arrest, will not render the company liable.[4]

§ 332. PLACE OF EJECTION.

At common law, and in the absence of statute, one wrongfully on a train may be expelled at any point not dangerous, and the conductor is not required to wait until a station is reached.[1] The fact that there

[3] Sullivan v. Railroad Co., 148 Mass. 119, 18 N. E. 678. See, also, § 312. To be drunk in the waiting room of a depot—a public place—is disorderly conduct, within Rev. St. Tex. 1879, art. 363, which authorizes arrests for disorderly conduct without a warrant. Pratt v. Brown, 80 Tex. 608, 16 S. W. 443.

[4] Baltimore & O. R. Co. v. Cain, 81 Md. 87, 31 Atl. 801.

§ 332. [1] Louisville & N. R. Co. v. Johnson, 92 Ala. 204, 9 South 269; Everett v. Railroad Co., 69 Iowa, 15, 28 N. W. 410; Brown v. Railroad Co., 51 Iowa, 235, 1 N. W. 487; Southern Kan. Ry. Co. v. Hinsdale, 38 Kan. 507, 16 Pac. 937; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54; McClure v. Railroad Co., 34 Md. 532; Great Western Ry. Co. v. Miller, 19 Mich. 305; Wyman v. Railroad

is a storm threatening, and a possibility that a trespasser, if ejected, will be caught in it, does not require that he be put off only at a regular station.[2] So, one traveling on a passenger boat, who neither produces a ticket nor pays fare when called upon, and who, after being informed that if he does not pay his fare he will be put on shore, and is allowed a reasonable time to deliberate, and who then suffers himself to be landed on a shore to which he is a stranger, at a point distant from any habitation, during a storm, in the night, rather than pay 50 cents to complete the journey, although possessed of ample means to pay, is without any just cause of complaint, and cannot recover damages from the vessel owner.[3]

But where a person is not a trespasser,—as a passenger who declines to pay fare because no seat is furnished him,—the carrier must exercise its right of ejection at some regular station on its road; otherwise it will be liable therefor.[4] So, it has been held that a commuter who has mislaid his ticket, and who cannot produce it on request of the conductor, as required by the terms of the ticket, can be ejected only at a station, and his ejection between stations by a conductor who knows that he is a commuter renders the company liable.[5]

Co., 34 Minn. 210, 25 N. W. 349; Railroad Co. v. Skillman, 39 Ohio St. 444; Moore v. Railroad Co., 38 S. C. 1, 16 S. E. 781; Rudy v. Railway Co., 8 Utah, 165, 30 Pac. 356.

[2] Burch v. Railway Co., 3 App. D. C. 346.

[3] Magee v. Navigation Co., 46 Fed. 724.

[4] Hardenbergh v. Railway Co., 39 Minn. 3, 38 N. W. 625.

[5] Maples v. Railroad Co., 38 Conn. 557.

§ 333. SAME—STATUTORY REQUIREMENTS.

Statutes in many of the states require ejection to be made at a usual stopping place or near some dwelling house.[1] These statutes are restrictive of the common law, and by necessary implication prohibit the passenger's expulsion at any place other than those fixed by statute.[2] This rule holds good, though the next station is the passenger's destination.[3]

By "usual stopping place" is meant either a regular station, or any other place which a railroad company expressly, by public notice or otherwise, or impli-

§ 333. [1] Mansf. Dig. Ark. § 5474; Civ. Code Cal. § 2188; Gen. St. Conn. 1888, § 3541; Comp. Laws Dak. 1887, § 3807; Rev. St. Fla. 1892, § 2267; Rev. St. Ind. 1894, § 5181 (Rev. St. Ind. 1881, § 3921); Civ. Code Mont. 1895, § 2898; Gen. St. Nev. 1885, § 883; 1 How. Ann. St. Mich. § 3370; Rev. St. Mo. 1889, § 2581; Revision N. J. p. 932, § 113; Laws N. Y. 1850, c. 140, § 35; Code N. C. 1883, § 1962; 2 Comp. Laws Utah 1888, p. 32, § 2354; Sanb. & B. Ann. St. Wis. § 1818. At any regular station, Pub. St. R. I. p. 409, c. 158, § 32; V. S. 1894, § 3915. Within five miles of a station, Comp. Laws Neb. 1893, p. 310, § 107.

[2] Phettiplace v. Railroad Co., 84 Wis. 412, 54 N. W. 1092; Buehm v. Railway Co., 91 Wis. 592, 65 N. W. 503; Nichols v. Railway Co., 7 Utah, 510, 27 Pac. 693; Durfee v. Railway Co., 9 Utah, 213, 33 Pac. 944; Stephen v. Smith, 29 Vt. 160; Illinois Cent. R. Co. v. Sutton, 53 Ill. 397; Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460; Terre Haute, A. & St. L. R. Co. v. Vanatta, 21 Ill. 187.

[3] St. Louis, I. M. & S. Ry. v. Branch, 45 Ark. 524. A statement by a passenger, who refuses to pay fare, that he will get off if the conductor will stop the train, is no justification for his forcible expulsion by the conductor, after the train comes to a standstill, and he refuses to get off, at a place other than a regular station. Chicago & N. W. Ry. Co. v. Peacock, 48 Ill. 253.

edly, by use for such purposes, has designated as a proper place for passengers to get on or off its trains, and where they would, in consequence thereof, have the right to demand the exercise of this privilege.[4] So, the term "regular station" in such a statute means a place on the railroad where passenger trains usually stop for the purpose of having passengers get on or off such train, and not the town or village in which a railroad company may have its passenger and depot building. A railroad company does not comply with the statute when it puts a passenger off at a point on its track distant from a fourth to a half of a mile from its depot platform, even though such point be within the corporate limits of the village or city where such depot is located.[5] But under a statute which authorizes an expulsion "near a dwelling house," the fact that the occupant is temporarily absent, and the

[4] Texas & P. R. Co. v. Casey, 52 Tex. 112. A water tank, about a quarter of a mile from a station, is not a "regular stopping place," within the meaning of the statute. The statute means the usual stopping place for the discharge of passengers. Chicago & A. R. Co. v. Flagg, 43 Ill. 364. A passenger station, within the meaning of such a statute, must at least be a stopping place where passenger tickets are ordinarily sold. Baldwin v. Railway Co., 64 N. H. 596, 15 Atl. 411.

[5] Illinois Cent. R. Co. v. Latimer, 128 Ill. 163, 21 N. E. 7. In an action for putting a six year old child off the train about half a mile from the depot, but within the corporate limits of the town, evidence that another train was expected to arrive, within a few minutes, at the place of the removal, is competent, on the question whether it was proper or improper for the conductor to make the removal at that particular point. Id. But a passenger on a freight train may be ejected at the usual point adopted for that mode of travel, and the train need not be drawn up at the passenger platform. Illinois Cent. R. Co. v. Nelson, 59 Ill. 110.

house closed, does not render it wrongful for a conductor to expel a passenger there.[6]

These statutes do not, however, apply to one who rides on a freight train, in violation of the company's rules, and he may be ejected at a place other than a station.[7] So, where the statute fixing the place of ejection applies only to the nonpayment of fare, a passenger expelled for other causes than the nonpayment of fare may be expelled at any convenient and safe point on the road.[8]

[6] Patry v. Railway Co., 77 Wis. 218, 46 N. W. 56. To put off a passenger, on a dark night, within 25 or 30 rods of a dwelling house, of whose location he is ignorant, cannot be said, as matter of law, to be a compliance with the statute. Loomis v. Jewett, 35 Hun (N. Y.) 313. Where a passenger, unable to read, shows her ticket to the brakeman of a train before boarding it, and he assists her on the train, and the conductor, on taking up her ticket, discovers that hers is issued by another road, and not good on his train, it is the duty of the company either to return her, without charge, to the place whence she started, or to leave her at some other point, where she can most speedily, conveniently, and safely reach a train on the other road which will take her to destination. If, on the other hand, she failed to show the ticket to the brakeman or any other employé of the road, and got on the train by reason of her own mistake, then she was wrongfully on the train, and could be expelled for nonpayment of fare "at any usual stopping place, or near any dwelling house." Patry v. Railway Co., 77 Wis. 218, 46 N. W. 56; Id., 82 Wis. 408, 52 N. W. 312.

[7] Hobbs v. Railway Co., 49 Ark. 357, 5 S. W. 586.

[8] South Fla. R. Co. v. Rhodes, 25 Fla. 40, 5 South. 633. Though, as a general rule, a person not lawfully on a train can be expelled only at a regular station, yet one who has been thus expelled, and who again leaps on the train as it is pulling out of a station, occupies quite a different position from that of a person who enters the cars under a mistaken notion that he has a right to do so. Chicago, B. & Q. R. Co. v. Boger, 1 Ill. App. 472. In an action for ejecting a passenger at a point other than a regular stopping place, the court cannot pre-

In Indiana it has even been held that a statute which provides that a passenger refusing to pay fare "may be ejected at any usual stopping place" is permissive only, and hence that a passenger may be ejected for nonpayment of fare at a place other than a usual stopping place.[9] So it has been recently held that

sume that the Utah statute, or one similar to it, requiring passengers to be put off at a regular stopping place, is in force in Colorado, where the ejection took place, but the presumption is that the common law is in force there. Rudy v. Railway Co., 8 Utah, 165, 30 Pac. 366.

[9] Baltimore, P. & C. R. Co. v. McDonald, 68 Ind. 316; Toledo, W. & W. Ry. Co. v. Wright, Id. 586; Jeffersonville R. Co. v. Rogers, 28 Ind. 1. This astonishing conclusion was reached by the following process of reasoning: "Is it meant by this provision of the statute that a man may get on a train at one station, and refuse to pay fare, and compel the railroad company to carry him to the next station before he can be put off? And that he can thus get on the train, when it is moving out, and again refuse to pay fare, and compel the company to carry him to the next station, and so on, to the end of the road? Such a construction and interpretation of the statute would, to say the least, make it very inconvenient for railroad corporations in many instances to collect any fare whatever. A better and more rational interpretation of the statute is that it was intended by the legislature to be a police regulation, for the purpose of protecting the public from the dangers of frequent and unnecessary stopping of trains between stations, or the peril to the traveling public consequent upon the increase of speed necessary to regain time lost. But, if a passenger refuses to pay fare, he has no right to complain for being put off the train, for the reason that such refusal to pay fare, on proper request, makes him an intruder or wrongdoer from the beginning." Baltimore, P. & C. R. Co. v. McDonald, 68 Ind. 316. In Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, it was held that the statutory requirement that passengers refusing to pay fare be expelled at a regular station does not apply to a passenger who has purchased a ticket, and refuses to surrender it to the conductor on demand. In such a case the company may at once expel him from the train, using no more force than may be necessary for that purpose, and not selecting a dangerous or inconvenient place.

a railroad passenger carried beyond the point of destination is still entitled to be treated as a passenger; but, unless the occurrence was due to the fault or negligence of the carrier, it is entitled to collect fare, and, on refusal, may rightfully eject the passenger, who has no right to demand to be carried to a station.[10]

§ 334. MODE OF EJECTION.

One who is unlawfully on a train may be expelled without unnecessary force; and, though injury results, he has no right of action if excessive force was not used.[1] Force may be used to compel even a female passenger who refuses to pay fare to leave the train.[2] It

[10] Scott v. Railway Co., 144 Ind. 125, 43 N. E. 133.

§ 334. [1] Grogan v. Railway Co., 39 W. Va. 415, 19 S. E. 563.

[2] Chicago, R. I. & P. R. Co. v. Herring, 57 Ill. 59. "This is not a question of gallantry or sex, but simply of legal right, and, as the plaintiff confessedly declined to pay her fare, the company was under no obligation to carry her, and had a right, by its agents, to use all the force required to remove her. It would be preposterous to demand of railway companies that they should permit all women who decline to pay their fares to travel unmolested in their cars, or that force should not be used to expel them, if they should so far unsex themselves as to make a resort to force necessary." Id. Civ. Code Cal. § 488, which requires every conductor to wear a badge, and which prohibits him from collecting fare without such badge, is not intended to limit the power of the corporation in the conduct of its business, but it is for the protection of passengers; and a passenger who recognizes a conductor as such, and treats with him as such as to the proper amount of fare, must place her refusal to pay the fare demanded, or to comply with his directions, on the ground that he is without his badge, so that he may obviate the objection; and, after she is excluded from the car for refusal to pay the regular fare, she cannot afterwards be heard to object that the conductor was without his badge. Cox v. Railway, 109 Cal. 109, 41 Pac. 794.

has been held in a recent Southern case that, if a white passenger is wrongfully ejected from the train, the fact that a colored train hand was called upon to assist in so doing will not make the company liable for greater damages than should be recovered if the train hand had been a white man. [3]

But in exercising a legal right of ejection railway companies must not do so in an abusive way. They are the servants of the public; and, while their right to enforce reasonable regulations will be upheld, yet the regulations must not only be reasonable in themselves, but the manner and method of enforcing such regulations must be reasonable, and free from unnecessary force, as well as from unnecessary indignity.[4] If a conductor uses unnecessary force in ejecting a passenger, the company is liable, although the conductor may have a right to eject him, and to employ reasonable force to expel him from the train.[5]

[3] Central Railroad & Banking Co. v. Strickland, 90 Ga. 562, 16 S. E. 352.

[4] Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5.

[5] Chicago, St. L. & P. R. Co. v. Bills, 104 Ind. 13, 3 N. E. 611; State v. Ross, 26 N. J. Law, 224; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155; Haman v. Railway Co., 35 Neb. 74, 52 N. W. 830; International & G. N. Ry. Co. v. Leak, 64 Tex. 654; Bourke v. Railroad Co. (Pa.) 1 Lack. Leg. Rec. 108. Though a trespasser on a train has not gained the interior of the car, and is standing on the steps, the conductor has no right to eject him in such a manner as to endanger life or limb. Kline v. Railroad Co., 39 Cal. 587. If more force than necessary is used in ejecting a person wrongfully on the train, resulting in stunning or paralyzing him, so that he is incapable of taking care of himself, and because of such incapacity he falls into mud and water alongside of the track, and is drowned, the company is liable. Gill v. Railroad Co., 37 Hun (N. Y.) 107. A colored wo-

This is but the application of an old principle, old as the law itself, to a modern instance; for it has ever been the law that no man has a right to employ unnecessary force in doing any act.[6] Even a trespasser cannot be ejected from a train without a reasonable regard for his safety.[7] It is universally held that the fact that one is a trespasser does not justify his ejection from a train while in rapid motion.[8] So the fact

man who is ejected from a waiting room set apart for white passengers may recover, if the ejection was done with unnecessary force and violence. Rose v. Railway Co., 70 Miss. 725, 12 South. 825. In an action by a passenger for forcible ejection from a street car, evidence is admissible as to the continuance of the assault by the conductor, to show the injuries he then received, to throw light on the character of the transaction, the amount of force used, and the spirit and method adopted by the conductor in his attempt to execute what he believed to be his duty. Denver Tramway Co. v. Reed, 4 Colo. App. 500, 36 Pac. 557.

[6] Chicago, St. L. & P. R. Co. v. Bills, 104 Ind. 13, 3 N. E. 611.

[7] Arnold v. Railroad Co., 115 Pa. St. 135, 8 Atl. 213. In ejecting a trespasser from a train, the train hands should use reasonable and ordinary care not to injure him. Houston & T. C. R. Co. v. Grigsby (Tex. Civ. App.) 35 S. W. 815.

[8] Lake Erie & W. R. Co. v. Matthews, 13 Ind. App. 355, 41 N. E. 842; Harlinger v. Railroad Co., 15 N. Y. Wkly. Dig. 392, affirmed 92 N. Y. 661; Law v. Railroad Co., 32 Iowa, 534; State v. Kinney, 34 Minn. 311, 25 N. W. 705; Texas & P. Ry. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 79. The fact that a boy is a trespasser does not warrant a railroad employé in kicking him from the train while in motion. Rounds v. Railroad Co., 64 N. Y. 129, affirming 3 Hun (N. Y.) 329, 5 Thomp. & C. (N. Y.) 475. An action may be maintained against a railway company for forcibly ejecting a disorderly passenger while the train is in motion, though no special injury was occasioned thereby. The plaintiff is entitled to recover such damages as the jury shall allow for the unjustifiable assault, subject to the power of the court to set the verdict aside in case it should be excessive. Oppenheimer v. Railway Co., 63 Hun, 633, 18 N. Y. Supp. 411.

that a passenger on a street car uses indecent or profane language does not justify the conductor in pushing or throwing him from the car while in motion.[9] So the employés on a street car have no right to throw a boy stealing a ride from the car while in motion, or to so violently assault or frighten him as to cause him to fall from the car.[10]

§ 335. SAME—RESISTANCE OF PASSENGER.

As has heretofore been stated, a passenger rightfully on a train has a right to resist ejection.[1] So a person, though wrongfully on a train, is justified in resisting an attempt to eject him while the train is in motion.[2]

But violence on the part of a passenger in resisting an expulsion rightfully attempted by the train hands increases the violence necessary and proper to be used on their part.[3] The use of force is to be proportioned to the resistance to the removal by the trespasser. If a conductor is assaulted while ejecting a trespasser,

[9] Chicago City Ry. Co. v. Pelletier, 134 Ill. 120, 24 N. E. 770; Id., 33 Ill. App. 455.

[10] Ansteth v. Railway Co., 145 N. Y. 210, 39 N. E. 708, affirming 9 Misc. Rep. 419, 30 N. Y. Supp. 197. See, also, Lovett v. Railroad Co., 9 Allen (Mass.) 557; Barre v. Railway, 155 Pa. St. 170, 26 Atl. 99. But removing a trespasser from a train of cars moving very slowly is not negligence or wantonness per se. Southern Kan. Ry. Co. v. Sanford, 45 Kan. 372, 25 Pac. 891.

§ 335. [1] See ante, § 326.

[2] Sanford v. Railroad Co., 23 N. Y. 343, reversing 7 Bosw. (N. Y.) 122.

[3] Coleman v. Railroad Co., 106 Mass. 160, 167; Lillis v. Railway Co., 64 Mo. 464; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54.

he may also assault his assailant. A conductor is not devested of the right of self-defense by his office. If in danger, from his assailant, of death or great bodily harm, he may meet force with force. If a conductor, while in discharge of his duty to the railroad company, is assaulted, so that personal injury is being done him, he may strike until the danger is averted; and, when the injuries to the assailant are the result of such self-defense by the conductor, the jury are not required to nicely weigh such injuries to the assailant, to see whether the punishment he received was too severe. When one assaults a conductor while in the performance of the duties of his office, and in repulsing such force the conductor injures the assailant severely, the conductor, when his conduct is being considered by the jury, is not subject to punishment for such injuries, unless greatly disproportioned to the violence offered him, and unless the injuries were inflicted wantonly or maliciously.[4]

§ 336. SAME—ORDERS AND THREATS.

To enable a passenger to recover for wrongful expulsion, it is not necessary that the conductor should have put his hands on him. A conductor may expel a passenger as effectually by ordering him off as by pushing him off. He is a man of authority, and may

[4] Moore v. Railroad Co., 38 S. C. 1, 16 S. E. 781. A complaint which alleges that plaintiff was ejected with such violence as to be thrown to the ground cannot be sustained on the theory that unnecessary force was used, since it may be that the force was rendered necessary by his own resistance. Chicago, St. L. & P. R. Co. v. Bills, 104 Ind. 13, 15, 3 N. E. 611.

exert that authority by words as well as by any physical force.[1] But where a passenger is wrongfully on a train, the imperative manner and form of speech of the conductor in informing her that she must get off are not actionable, in the absence of violence or other misconduct, though the fright caused by such language produced sickness.[2]

§ 336. [1] Central Railroad & Banking Co. v. Roberts, 91 Ga. 513, 18 S. E. 315; Georgia Railroad & Banking Co. v. Eskew, 86 Ga. 641, 12 S. E. 1061.

[2] New York, L. E. & W. Ry. Co. v. Bennett, 1 C. C. A. 544, 50 Fed. 496. In this case it was said: "The law is not so unreasonable as to exact from the conductor of a passenger train, or the master of a steamship, upon whose vigilance and competency the lives and safety of passengers are dependent, a rigid observance of the formal amenities of social life, in the necessarily hurried discharge of his varied and important duties. It requires that he shall demean himself with civility, and shall protect passengers from insult and violence from others. Beyond this, it has no standard of conduct, no code of manners. Of necessity, his communications with his passengers are in the main purely of a business nature. He has scant time for explanations; none for discussion or loquacity. The natural effect of his great and urgent responsibilities is to beget a characteristic brevity and bluntness of manner and speech, varying in degree with the temperament and circumstances of the individual, often perhaps displeasing to the sensitive and inexperienced traveler, yet as far removed from legal censure as the demand of a lawful right in terse phrase. While his own and his employer's interest would be best served by a uniformly complaisant speech and demeanor, the mere lack of both is not insult; nor is his failure to gauge his address to the sensibilities, temperament, or latent ailments of his passengers actionable dereliction. When called upon to declare the invalidity of a ticket, or to deny a passenger's claim to transportation, or to announce his duty to eject a person who refuses to pay fare, if he uses only the customary plain and positive diction of business, his employer cannot be mulcted in damages, or legally reprehended for his plain speaking or peremptory manner." In Stone v. Railway Co., 47 Iowa, 82, it

A question sometimes arises as to the right to recover for injuries sustained in jumping from a moving train or street car in obedience to the order of the conductor or driver. It is generally held that a child of tender years may recover for injuries thus sustained, since his obedience is naturally to be expected, without regard to the risk he might incur. So, an order by a conductor to a 16 year old boy to get off a moving train, accompanied with a show or demonstration of force sufficient to impress him with the belief that it will be used, is equivalent to the employment of actual force; and the boy cannot, as matter of law, be said to be guilty of contributory negligence in obeying the order.[4] The same principle is

was held that a passenger who has been rightfully ejected, without unnecessary force, for refusal to pay fare, cannot complain of insulting or discourteous treatment at the hands of the company's employés.

[3] Lovett v. Railroad Co., 9 Allen (Mass.) 557; Vicksburg & M. R. Co. v. Phillips, 64 Miss. 636, 2 South. 537; Sandford v. Railway Co., 153 Pa. St. 300, 25 Atl. 833; Biddle v. Railway Co., 112 Pa. St. 551, 4 Atl. 485; McCahill v. Railway Co., 96 Mich. 156, 55 N. W. 668; Mt. Adams & E. P. I. R. Co. v. Doherty, 8 Ohio Cir. Ct. R. 319. But it is for the jury to say whether defendant's conductor was wantonly and willfully negligent in ordering a trespassing boy to get off a moving train, it appearing that he was in the habit of getting on and off defendant's running trains; that several other boys, his companions, had just alighted with safety; and that the train was not moving so fast to make it negligence per se to get off. Thompson v. Railroad Co., 72 Miss. 715, 17 South. 229.

[4] Kline v. Railroad Co., 39 Cal. 587; Texas & P. Ry. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 79. The fact that a boy was a trespasser on a freight train, stealing a ride, is not a material element in determining whether or not he was guilty of contributory negligence in obeying the conductor's order to leave the train while in motion. Benton v. Railroad Co., 55 Iowa, 496, 8 N. W. 330.

generally applied to adults. While a mere direction or command by the agent of a railroad company requiring a trespasser to leave the train does not amount to force, yet, if the latter acts under fear of it, the effect on his mind is the same, and a recovery for injury sustained in obeying the order is not prevented by the fact that no physical force was used.[5] So, though a person is wrongfully on a train, the conductor has no right to compel him, at the point of a pistol, to jump from it while in motion.[6] The supreme judicial court of Massachusetts has, however, recently come to a different conclusion. A trespasser stealing a ride was discovered by a brakeman, who was on

[5] Southwestern R. v. Singleton, 67 Ga. 306. A person holding a ticket boarded a freight train not allowed to carry passengers, believing the ticket to be good on that train. The conductor ordered him to get off the train while it was in motion, refused to stop the train to permit him to get off, and in violent and insulting language threatened to eject him by force if the order was not obeyed. Held, that such person was not chargeable with contributory negligence in jumping from the train to avoid ejection by force. Boggess v. Railway Co., 37 W. Va. 297, 16 S. E. 525. The legal liability of the defendant is the same, whether plaintiff was pushed off by the conductor while the train was in motion, or got off in obedience to the order of the conductor, who was not only able, but evidently determined, to enforce it. Brown v. Railroad Co., 66 Mo. 588. A weak-minded trespasser on a freight train, who jumps from the moving train on being told by a brakeman, who ordered him off, that, if he did not obey, the brakeman would get a gun and shoot him, is justified in acting on the threat, and may recover for injuries sustained, though there was no gun on the train. Houston & T. C. R. Co. v. Grigsby (Tex. Civ. App.) 35 S. W. 815.

[6] Gallena v. Railroad, 13 Fed. 116. But a passenger who refuses to pay fare, resists ejection, and threatens to kill the conductor, is not entitled to damages because the conductor presented a pistol at him and spoke of him as a coward. Harrison v. Fink, 42 Fed. 787.

another car. The brakeman ordered him off, but he disobeyed the order. The brakeman repeated it, threatening to throw him off, at the same time raising a club. He remonstrated with the brakeman, stating that the train was moving too fast, and entreating him to stop the train. The brakeman repeated his threat, and made a movement towards plaintiff, with his club upraised. Thereupon plaintiff attempted to alight from the train, which was running eight or ten miles an hour, and was injured. It was held that plaintiff's own consciousness of wrongdoing, and his fear of punishment under the law, operated together with the order in inducing him to take the risk of jumping, and were so inseparably connected with the conduct of the brakeman, in furnishing one of the motives which determined his choice to jump rather than remain or go forward, that they must be taken as contributing causes of the accident, and therefore barred a recovery.[7]

§ 337. SAME--PROVINCE OF COURT AND JURY.

Generally, the question whether or not excessive force was used in removing a trespasser from a train is one of fact for the jury. This is true even where blows are struck, provided they were rendered necessary by the passenger's resistance; and it is error to instruct that striking blows is illegal.[1] So, whether

[7] Planz v. Railroad Co., 157 Mass. 377, 32 N. E. 356.

§ 337. [1] Coleman v. Railroad Co., 106 Mass. 160, 161. The question whether the conductor properly discharged his duty in expelling a passenger, whose ticket did not entitle him to ride on the train,

it is due and proper exercise of the right to eject for the conductor of a street car to attempt to remove a disorderly passenger while the car is in motion, is not a question of law for the court, but of fact for the jury, and should be determined by them upon all the evidence, including the rate of speed at which the car was moving.[2]

§ 338. REFUNDING FARE.

It has been held that on ejecting a person from a train, who has paid the whole or any part of his fare, the carrier must refund it, less the amount due for

from the cars, between the tracks of a railroad, on a very dark night, at a way station, is for the jury. Everything depends on the facts and circumstances. Arnold v. Railroad Co., 115 Pa. St. 135, 8 Atl. 213. Where a conductor stops his train to put a female passenger off for refusal to pay fare, and on her failure to get off he takes hold of her arm, asks her to come, and not delay the train, and lifts her down, the jury is warranted in finding the removal to be forcible, though the conductor testifies that he merely assisted her to alight. Curtis v. Railroad Co., 87 Iowa, 622, 54 N. W. 339.

[2] Murphy v. Railway Co., 118 Mass. 228. Whether or not a conductor is guilty of negligence in putting a person off a car just after the train has started from a depot, and while its motion is scarcely perceptible, is a question of fact for the jury, and it is error for the court to charge that such act is negligence. Meyer v. Railroad Co., 40 Mo. 151. A servant of a railroad, in the performance of his duty in removing a trespassing boy from a car, is bound to use ordinary care; and when he pulls the boy, clinging to the ladder of the car, from the train while in motion, and the boy falls under the car and is injured, the question of negligence is for the jury. Brill v. Eddy, 115 Mo. 596, 22 S. W. 488. The fact that a train was moving at the rate of 20 miles an hour when a passenger was removed from one car to another does not, as matter of law, render the removal unreasonable or wrongful, but the question is one of fact for the jury. Marquette v. Railroad Co., 33 Iowa, 562.

the distance traveled to the place of ejection.[1] Thus, where a conductor ejects an adult having in charge a child, for refusal to pay the child's fare, it is his duty, before the ejection, to return or offer to return to such person the value of the unused portion of the ticket.[2] It has even been held that the repayment of fare is a condition precedent to the right to expel, and a return of the money immediately after the expulsion will not relieve the carrier from liability.[3]

But it has been held that by refusing to comply with the reasonable regulations of the company a passenger forfeits his right to ride on the train; and hence, on his ejection, the conductor is not bound to refund to him the value of the ticket from the place of ejection to destination.[4] So it has been held that, even if a conductor has no right to take up a nontransferrable ticket when presented by one not the original purchaser, yet the holder has no right to demand a return of the ticket as a condition precedent to his paying fare. It was the holder's duty to leave the train or pay his fare, and then pursue his remedy against the carrier for wrongfully withholding the ticket.[5]

The California Code[6] provides that, after having

§ 338. [1] Thurston v. Railroad Co., 4 Dill. 321, Fed. Cas. No. 14,019; Wardwell v. Railroad Co., 46 Minn. 514, 49 N. W. 206; Hoffbauer v. Railroad Co., 52 Iowa, 342, 3 N. W. 121; Baltimore, P. & C. R. Co. v. McDonald, 68 Ind. 316.

[2] Lake Shore & M. S. Ry. Co. v. Orndorff (Ohio) 15 N. E. 117.

[3] Wardwell v. Railway Co., 46 Minn. 514, 49 N. W. 206.

[4] Gregory v. Railway Co. (Iowa) 69 N. W. 532.

[5] Reilly v. Railway Co. (Minn.) 68 N. W. 853.

[6] Civ. Code Cal. § 2190; Comp. Laws Dak. 1887, § 3897.

ejected a passenger, a carrier has no right to require the payment of any part of his fare. It has accordingly been held that, before a conductor can expel a passenger for refusal to pay full fare, he must return the fare which he has actually received.[7] But where a passenger, after riding some distance in a chair car without paying the extra fare required by the company's rules, leaves the train, and discontinues his trip, rather than continue on his journey in another car, the fact that his ticket was not returned to him does not entitle him to damages as for an ejection, but his claim must be for a return of the ticket money.[8]

§ 339. DUTY OF EJECTED PASSENGER.

A passenger who is wrongfully put off a train by a conductor is not bound to wait for the next train at the station where she was put off, and it is not negligence for her to undertake to walk back to the station whence she started.[1] But it is the duty of a passenger who is wrongfully ejected from a train, and placed upon the track, to leave the track at the earliest practicable opportunity that a reasonably prudent man would discover and seize upon; and the burden of proof that he did so is upon him.[2]

[7] Bland v. Railroad Co., 65 Cal. 626, 4 Pac. 672; Id., 55 Cal. 570.

[8] Wright v. Railroad Co., 78 Cal. 361, 20 Pac. 740.

§ 339. [1] Malone v. Railroad Co., 152 Pa. St. 390, 25 Atl. 638. See, also, ante, § 120.

[2] Ham v. Canal Co., 155 Pa. St. 548, 26 Atl. 757; s. c. 142 Pa. St. 617, 21 Atl. 1012. In this case a passenger was wrongfully ejected from a train in an apparent wilderness, and where the only possible way out seemed to be along the railroad track. He was ignorant of

the surrounding country, and, knowing of no opening by which he could get off the track, and upon the traveled road, he took the track upon which he would face approaching trains. He followed it until he came to a bridge, and in crossing the bridge he was struck by a locomotive and killed. The evidence as to the distance he walked varied, but the lowest estimate placed it at about half a mile. There was evidence on behalf of defendants that there was a traveled road which could easily be seen from the point where deceased was put off the train. Held, that the case was for the jury, and their verdict in plaintiff's favor would not be disturbed.

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